BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

Ohio Power Company,	)	
	)	
Complainant,	)	
	)	
v.	)	Case No. 21-990-EL-CSS
	)	
Nationwide Energy Partners, LLC,	)	
	)	
Respondent.	)	

APPLICATION FOR REHEARING OF OHIO POWER COMPANY

Under R.C. 4903.10 and OAC 4901-1-35, Ohio Power Company ("AEP Ohio or the "Company") respectfully submits this Application for Rehearing of the Commission's September 6, 2023 Opinion and Order in this proceeding ("Opinion and Order"). As explained in the accompanying Memorandum in Support, the Opinion & Order was unlawful and unreasonable in the following respects:

I. *First Ground for Rehearing*: The Commission's "Narrow and Limited" Ruling in Favor of NEP on Part 2 of NEP's Count I Is an Unreasonable and Unlawful Application of the Complaint Case Statute, R.C. 4905.26.

A. The Complaint Case Statute, R.C. 4905.26, Is a Jurisdictional and Procedural Mechanism, Not an Independent Standard that Entities Can "Violate."

B. It Is Unreasonable to Fault AEP Ohio for Its Actions Following the *Wingo* Complaint Dismissal Because AEP Ohio Faced an Uncertain Legal Issue with No Guidance from the Commission, and AEP Ohio Acted in Good Faith and Simultaneously Brought the Issue to the Commission for Decision.

C. The Commission Denied AEP Ohio Its Right to Due Process of Law by Finding that AEP Ohio "Violated" a Rule That Did Not Exist at the Time.

D. A Finding that AEP Ohio "Violated" R.C. 4905.26 Is Not Necessary to Reach the Same Result in This Case Including the Decision to Direct Changes to AEP Ohio's Practices or Tariff.

II. ***Second Ground for Rehearing*: The "Electric Reseller Tariff" Ordered by the Commission Is Unlawful Under the Commission's Own Interpretation of "Electric Light Company" Under R.C. 4905.03(C), Violates the Statutory Rulemaking Procedures in R.C. Chapter 106, and Results in an Unreasonable Tariff Paradigm.**

A. The Commission's Reinstatement of the "SSO Price Test" Through a Tariff Contravenes the Express Instructions of the Supreme Court's Remand Order in *Wingo*.

B. By Ordering the "Electric Reseller Tariff," the Commission Expanded the Scope of Its Disconnection Rules (OAC 4901:1-18) and Enacted Other Rules of General Applicability Without Following the Statutory Rulemaking Procedures in R.C. Chapter 106.

1. The Commission Did Not Provide Adequate Notice and Opportunity to Be Heard.

2. The Commission Discriminatorily Ordered Protections for Certain, but Not All, Tenants in the State of Ohio.

3. The Commission Failed to Follow Mandatory Statutory Procedures Required to Amend the Administrative Rules.

C. It Is Unlawful and Exceeds the Commission's Statutory Jurisdiction Under R.C. 4905.03(C) for the Commission to Conclude that NEP (and Landlords) Are Not "Electric Light Companies" and Yet Regulate Them Through AEP Ohio's Tariff's as if They Were.

D. The "Electric Reseller Tariff" Is Unworkable for Several Reasons.

III. ***Third Ground for Rehearing*: The Commission's Application of the Jurisdictional Statute, R.C. 4905.03(C), to NEP Is Legally and Factually Erroneous.**

A. The Commission's Definition of "Consumer" in R.C. 4905.03(C) Is Contrary to That Term's Plain Meaning.

B. The Commission's Conclusion that NEP Is Not "Engaged in the Business of Supplying Electricity" Under R.C. 4905.03(C) Is at Odds with the Plain Meaning of "in the Business of" and "Supplying" and Incorrectly Credits Formalisms Such as "Agency" That Cannot Be Found in the Statute.

IV. ***Fourth Ground for Rehearing*: The Commission's Stay Order and Final Order Were Unlawful Because the Commission Failed to Consider Whether AEP Ohio's Forced Abandonment of the Apartment Complexes Was "Reasonable" and Promoted the "Welfare of the Public" Under the Miller Act, R.C. 4905.20-.21.**

A. AEP Ohio Did Not Waive Its Miller Act Arguments.

B. AEP Ohio's Miller Act Arguments Are Not Moot.

C. AEP Ohio Was Not Required to File a "Separate Application for Abandonment" to Properly Invoke the Miller Act in This Proceeding.

D. On Rehearing, the Commission Should Conclude that the Required Conversions to Master Meter Service Are Unreasonable Under the Miller Act.

Respectfully submitted,

Steven T. Nourse (0046705), Counsel of Record
Michael J. Schuler (0082390)
American Electric Power Service Corporation
1 Riverside Plaza, 29th Floor
Columbus, Ohio 43215
Telephone: (614) 716-1608 (Nourse)
Telephone: (614) 716-2928 (Schuler)
Email: stnourse@aep.com
Email: mjschuler@aep.com

Matthew S. McKenzie (0091875)
M.S. McKenzie Ltd.
P.O. Box 12075
Columbus, Ohio 43212
Telephone: (614) 592-6425
Email: matthew@msmckenzieltd.com

(willing to accept service by email)

Counsel for Ohio Power Company

MEMORANDUM IN SUPPORT

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INTRODUCTION

AEP Ohio's resale tariff as approved by the Commission mirrors Ohio law as it might change over time (*e.g.*, through caselaw such as the Supreme Court's *Wingo* decision): it restricts "unlawful" resale. There was a gap in the law left by the *Wingo* remand, and after *Wingo* it was unclear what constituted "unlawful" resale. AEP Ohio brought this complaint against NEP to seek guidance from the Commission on how to interpret its tariff and, while a decision was pending, to preserve the *status quo* for 1,171 AEP Ohio customers at five apartment complexes in AEP Ohio's service territory. As *Wingo* recognized, previous cases had addressed an original form of submetering where (a) the resale was conducted by the *landlord itself*, and not a third party; (b) the resale was conducted on the landlord's own property (*i.e.*, property that the landlord owned); (c) the landlord was merely recovering its electric costs (including, sometimes, an administrative fee) from tenants, and not attempting to generate a substantial profit; and (d) the resale of electricity was "ancillary" to the landlord's principal business of leasing residential or commercial real estate to tenants. *Wingo* contrasted this original form of submetering with what it called the "third party," "big business" form of submetering, where (a) the resale involved a "third party," not just the landlord; (b) the third party operated at "multiple properties" that it does not own; (c) the third-party reseller was generating substantial "profit," not just recovering costs; and (d) submetering is the third-party reseller's primary business, and is not "ancillary" to some other business the third-party reseller engages in. In his separate opinion, Commissioner Conway correctly and emphatically observed that the facts in this case are "novel and unprecedented" and do not "remotely resemble" the facts presented in prior submetering cases.

Unfortunately, the Opinion and Order brushes off this critical distinction as "background" in the Supreme Court's decision and sidesteps the Court's remand directive to apply the statutory provisions to the novel facts of large-scale third-party submetering practices. Instead, the Opinion and Order chooses to affirmatively sanction NEP's anti-consumer scheme by concluding based on "form over substance" that NEP is merely an agent for landlords that falls within the judicially-established landlord-tenant exception. After retrospectively finding that AEP Ohio somehow violated R.C. 4905.26 (the complaint case statute) by acting in good faith to implement its Commission-approved tariff in the wake of the *Wingo* vacatur, the Commission directs AEP Ohio to implement an even more problematic regulatory tariff solution that unlawfully attempts to regulate landlords. One of the tariff provisions ordered by the Commission unlawfully resurrects the same SSO price cap theory of jurisdiction that was just vacated by the Supreme Court. Moreover, the impractical tariff directive imposes an unreasonable burden on the Company and places it in even more peril going forward. In addition, the Opinion and Order violates the Miller Act, R.C. 4905.20-4905.21. Fundamentally, the Commission's decision is unlawful and unreasonable in four ways.

First, the Commission erred by endorsing a stray, minor argument of NEP's and finding that AEP Ohio "violated" R.C. 4905.26 "on a narrow and limited basis" at least "to the extent it applies to NEP." In so doing, the Commission incorrectly interpreted R.C. 4905.26 as a source of substantive rights as opposed to its intended purpose as a procedural vehicle to enforce a statute that establishes a substantive right (*e.g.*, R.C. 4905.35). The Commission has previously had correctly held that R.C. 4905.26 "operates as the *procedural* vehicle for bringing the complaint before this Commission." Holding that AEP Ohio "violated" R.C. 4905.26 is like saying the Commission "violates" the appeal statute, R.C. 4903.13, when the Supreme Court

reverses or vacates the Commission's order – as it did in *Wingo*. It is like concluding that a utility "violates" R.C. Chapter 4909 when the Commission orders new rates to replace the existing rates (the latter of which were, of course, previously approved by the Commission as being just and reasonable). Rather, the Commission was correct in the *Ihlendorf* case to conclude that R.C. 4905.26 is merely a procedural vehicle for raising concerns before the Commission and the *Allianz* decision was correct in concluding that the complaint case statute creates no independent claim.

The Commission also erred in faulting AEP Ohio for taking a position on a tariff provision that was neither self-executing nor unambiguous. The stark reality of AEP Ohio's situation was that, after dismissal of the *Wingo* complaint on remand and the lack of a Commission investigation or rulemaking, AEP Ohio was forced to decide how to interpret the "unlawful resale" provision of its tariff. The Commission's previous guidance, the "modified *Shroyer* test," had been vacated by the Court, and the Commission had provided no replacement test or any other guidance when it dismissed *Wingo* on remand. This situation necessarily demanded that AEP Ohio freshly scrutinize the factual and legal analysis of NEP's request to convert the five buildings at issue here to submetering, which AEP Ohio's legal counsel literally communicated to NEP the day after the *Wingo* decision was issued.

Significantly, in rejecting NEP's other counterclaims, the Opinion and Order itself affirmatively and repeatedly sanctions AEP Ohio's decision to bring this complaint case and emphasizes the difficulty of determining whether NEP engages in "unlawful resale." It was only after an "intense and in depth review" that the Commission determined that large-scale third-party submetering was lawful in light of the *Wingo* remand.

Even if AEP Ohio's policy was "unfounded and unreasonable," which AEP Ohio contests, adopting that policy cannot have violated a statute that does not, *itself*, prohibit unfounded or unreasonable policies. Holding that R.C. 4905.26 *independently* imposes a reasonableness standard, and that AEP Ohio's policy violated that standard, would render the statute unconstitutionally vague. The void-for-vagueness doctrine reflects the principle that a statute which either forbids or requires the doing of an act in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.

Similarly, in the absence of an established standard based in a statute, lawful rule, or Commission order, it is unreasonable and unlawful to form a statutory violation based purely on retroactively disagreeing with the Company's good faith actions in attempting to apply its Commission-approved tariff. A utility is constantly required to interpret and apply its tariffs and it cannot reasonably be considered a statutory violation to do so. Doing so is akin to unlawful retroactive ratemaking. The "violation" finding should be reversed or modified on rehearing.

Second, the Commission erred by *sua sponte* ordering AEP Ohio to establish a new "reseller tariff." The Commission ordered AEP Ohio to file tariffs requiring that: (1) a landlord's lease agreement contain a notice in all capital letters that the tenant agrees to have the landlord secure and resell electricity and that the customer will no longer be under the Commission's jurisdiction; (2) the landlord's resale of electricity is at an amount the same or lower than what a similarly situated SSO customer would pay; and (3) landlord disconnection of service to a tenant will follow the rules set forth in Ohio Adm. Code 4901:1-18 (collectively referred to as "Tariff Directive"). These tariff provisions unreasonable and unlawful for several reasons. Once the Commission disclaimed jurisdiction over the resale of electric service in submetering, the

Commission divested itself of jurisdiction to impose any regulations on that industry. In addition, the Commission's attempt to protect tenants by resurrecting the SSO Price Test flies directly in the face of the *Wingo* decision from just a few years ago. Moreover, the Commission also abridged the due process protections afforded to those that are impacted by this decision, which will be discriminatorily applied. Imposing half-measures will only serve to further confuse jurisdiction, place tremendous burden on AEP Ohio, and potentially harm a number of unknown parties, including tenants, that were not afforded an opportunity to heard.

Parties that will be impacted by this decision, including but not limited to AEP Ohio, were not given the requisite opportunity to be heard on these changes, which will result in discriminatory application of the Tariff Directive. This "split the baby" approach has also thrust AEP Ohio into an untenable position of having to police an immeasurable number of private entities (landlords/submetering companies) over which AEP Ohio retains no control and fails to solve for the jurisdictional conundrum of enforcing the Tariff Directive. Notably, the Commission's reinstatement of the "SSO Price Test" through a tariff contravenes the express instructions of the Supreme Court's remand order in *Wingo*. For these reasons, the Commission's decision requiring AEP Ohio to implement the Tariff Directive is unreasonable and unlawful.

Based upon the modified *Shroyer* Test, the Commission had found that NEP was not a public utility. But in reversing the Commission's determination, the Supreme Court of Ohio found that "whether someone is 'harmed' isn't a jurisdictional question; it is a merits question that can be answered ***only after*** it is determined that an activity falls within the PUCO's jurisdiction." The Opinion and Order's Tariff Directive is explicitly adopted to redress the "consumer" harms exposed and detailed through the testimony AEP Ohio witness Lesser. The Commission acknowledges the shocking loss of rights and protections that are afforded to

residential customers of regulated utilities to ensure that they "receive adequate, safe, and reasonable electric service, as required by law." But in finding "that NEP is not a public utility and therefore not subject to our jurisdiction" the Commission was forced to also find that it "lack[ed] the power to directly regulate NEP's actions."

Tariffs, however, reflect the terms and conditions of utility service that are enforceable by the utility, its customers, and the Commission. Therefore, under the Commission's ruling in this case, so long as submetering companies (such as NEP) and landlords do not charge more than the SSO, they will be outside the Commission's reach. By ordering the Tariff Directive, the Commission expanded the scope of its disconnection rules (OAC 4901:1-18) and enacted other rules of general applicability without following the statutory rulemaking procedures in R.C. Chapter 106. But it did so without following mandatory rulemaking requirements. The Commission did not provide adequate notice and opportunity to be heard. The Commission discriminatorily ordered protections for certain, but not all, tenants in the State of Ohio.

Third, the Commission should have applied the plain language of R.C. 4905.03(C) and concluded that NEP is "engaged in the business of supplying electricity . . . to consumers" and, therefore, is an "electric light company" and "public utility" under Ohio law. The Commission's contrary conclusion was erroneous because it interpreted R.C. 4905.03(C) in a manner that is contrary to the plain meaning of the statutory text and because it disregarded the substantial evidence in this case showing that NEP is, in substance, operating as a public utility. Instead, the Commission adopted NEP's "agency" formalism, which has no basis in law.

The Commission's initial error in applying R.C. 4905.03(C) was to interpret the word "consumer" in a manner that goes against that word's ordinary meaning. The Supreme Court has repeatedly held that statutory text should be interpreted according to the ordinary, dictionary

definitions of the words used, and dictionaries define "consumer" to mean a person that "utilizes" or "uses" an "economic good" or "service." Here, that means that the tenant of a submetered building who *uses electricity* to cook food, watch tv, dry clothes, etc. in her apartment must be a "consumer." Indeed, there is no question that the tenant is a "consumer" under R.C. 4905.03(C) on *Day One*, before submetering, when AEP Ohio serves the tenant directly. On *Day Two*, when the building converts to submetering, nothing changes about the way the tenant *uses electricity*, and the only reasonable interpretation of the statute is that the tenant remains a "consumer."

Rather than apply the ordinary meaning of the word "consumer," the Commission relied on inapposite Supreme Court cases that held that landlords of submetered buildings are "consumers" of electricity under R.C. 4905.03(C). But none of those cases addressed the critical question here – whether tenants in submetered buildings are ***also*** "consumers." Indeed, we know these cases did not foreclose a determination that submetered tenants are "consumers," for if they had, the *Wingo* decision (which thoroughly discussed this precedent) would have recognized this and held that precedent dictates that no submetering entity (whether landlord or NEP) can be "engaged in the business of supplying electricity . . . to *consumers*" under R.C. 4905.03(C). The fact that the Court did *not* hold this, but rather remanded the case to the Commission, logically entails that the precedent the Commission cites did not foreclose a determination that landlords and tenants in submetered buildings are ***both*** "consumers" under R.C. 4905.03(C). That, as discussed above, is the only reasonable way to apply the plain meaning of the order "consumer" in this context.

The Commission further erred in applying R.C. 4905.03(C) to NEP disregarding the substantial, detailed, comprehensive evidence in the record showing that NEP is "engaged in the

business of supplying electricity." R.C. 4905.03(C). To very briefly summarize the voluminous record, there was essentially undisputed evidence showing that NEP:

- Installs and operates all distribution equipment at a submetered building at its own expense.
- Maintains and repairs all distribution equipment at its own expense.
- Buys electricity at the master-meter at its own expense, including paying for distribution service from AEP Ohio and arranging and paying for generation service from a CRES.
- Reads meters, sends bills to tenants based on their usage, and collects *and keeps* the money that tenants pay for electric service.
- Offers tenants payment plans and maintains a customer service center to answer tenant questions about service and billing.
- Disconnects the electric service for tenants who do not pay their bills.

(*See infra* Section III.B for record citations.) All these activities are the *indicia* of an entity "engaged in the business of supplying electricity." R.C. 4905.03(C). They are the very same activities that AEP Ohio conducts when it serves tenants in an apartment building that is not submetered.

Despite being undisputed facts, the Opinion and Order did not seriously consider any of these activities or attempt to apply the record facts to meaning of the words "engaged in the business of supplying electricity" in R.C. 4905.03(C). Instead, the Commission credited a formalism invented by NEP: "agency." Following NEP, the Commission reasoned that if a landlord is allowed to submeter its tenants under existing precedent, then the landlord's "agent" must be permitted to do so too. This reasoning was erroneous in several ways.

As *Wingo* explained, landlords have been allowed to submeter tenants because landlords are "engaged in the business" of *renting apartments*, and submetering is merely "ancillary" to this "business." The record here, however, shows that NEP is not engaged in the business of being a landlord or renting apartments, but rather NEP "engaged in the business" of *submetering*

– that is, to use the Commission's own terminology, the business of "*reselling*" electricity. That differentiates NEP from landlords, and the Commission should have evaluated NEP own its own, rather than applying the legal status of landlords automatically to NEP.

In addition, the Commission's "agency" reasoning fails because, as a matter of law, the special legal status of principals (here, landlords) does ***not*** automatically confer to their agent (here, NEP). This kind of "legal status transfer" has no basis in the "black letter agency law" that NEP cited in support of its agency theory. For instance, an attorney may hire a non-attorney agent to enter into contracts on the attorney's behalf, but that agency relationship does not give the non-attorney agent the right to practice law. Whether the agent has a certain legal status (right to practice law) depends on whether the *agent herself* is duly licensed; it does not depend on the legal status of the principal.

Moreover, even if legal status did transfer from principal to agent (it does not), the record contains key facts showing that NEP *cannot, as a matter of law,* be NEP's agent. Namely, there are ways in which NEP does not follow landlord-tenant law – most notably, landlords are prohibited by law from disconnecting tenants' electric service, *see* R.C. 5321.12, yet NEP regularly disconnects for nonpayment. NEP cannot have it both ways. Either NEP is the landlord's agent for all parts of the law or it is not; it cannot pick and choose compliance with the law, being an agent for some parts of the Revised Code but not others. Since NEP has chosen not to be an agent of the landlord for purposes of the prohibition on landlord utility disconnections in R.C. 5321.12, it cannot now claim to be an "agent" of the landlord for purposes of R.C. 4905.03(C).

Fourth, because it was unlawful for the Commission to direct AEP Ohio to convert the five Apartment Complexes to master metered service without first determining, under the Miller

Act, whether such conversions are "reasonable," the Opinion and Order violates the Miller Act. As AEP Ohio noted on brief, the Miller Act provides that no public utility shall "be required to abandon or withdraw any … electric light line … or any portion thereof, … or the service rendered thereby" without holding a hearing to "ascertain the facts" and determine that the proposed abandonment is "reasonable, having due regard for the welfare of the public … ." (R.C. 4905.20 & R.C. 4905.21.)

The Commission's Opinion and Order, although lengthy, devotes only a single brief paragraph to AEP Ohio's contentions regarding the Miller Act. That short paragraph provides three bases for the Commission's rejection of those contentions. Notably, all three of these bases are procedural or prudential in nature; none of them address the merits of whether the required conversions are, in fact, "reasonable" under the Miller Act. Initially in this regard, the Commission implies (but does not directly state) that AEP Ohio waived its Miller Act arguments because "AEP Ohio's three counts within its Complaint do not specifically assert a Miller Act violation under R.C. 4905.20 and 4905.21." Next, the Commission concludes that because the conversions of the Apartment Complexes were already completed before the Commission issued its Opinion and Order, "any determination as to proper abandonment is moot." Finally, the Commission asserts that "AEP Ohio filed no separate application for abandonment for the Apartment Complexes based upon which we could make a decision." All three of these grounds for rejecting AEP Ohio's Miller Act claim are unlawful and unreasonable and conflict with the manifest weight of the record.

AEP Ohio *did* clearly invoke the Miller Act in writing, in Paragraph 4 of its Complaint, by stating that AEP "strongly values its relationship with its customers and *should not be forced to abandon them*." (Emphasis added.) AEP Ohio also expressly asked the Commission not to

"force" AEP Ohio to "abandon" its customers in Paragraphs 10, 70, 71, and 74 of the Complaint. And in its prayer for relief, AEP Ohio expressly requested a "finding and order that AEP Ohio need not terminate service to the Apartment Complex Customers and that AEP need not reconfigure and establish master meter service to the Apartment Complexes." Under black letter notice pleading standards, that is more than enough to raise the Miller Act issue for decision here. The alleged "mootness" of the determination, moreover, was caused only because the Commission required AEP Ohio to convert the apartment complexes in its Stay order, which *also* failed to address "reasonableness" and the "public interest" as required by the Miller Act. The Commission cannot escape the statutorily required Miller Act inquiry by granting interim relief without addressing the Miller Act and then later holding the Miller act issue is moot. Lastly, AEP Ohio was not required to file a separate abandonment proceeding. The statute contains no such "separate case" requirement, and the Commission has previously addressed Miller Act claims in a single proceeding along with other claims.

In sum, due to these four major errors, the Commission should reverse or modify its Opinion and Order on rehearing.

ARGUMENT

I. *First Ground for Rehearing*: The Commission's "Narrow and Limited" Ruling in Favor of NEP on Part 2 of NEP's Count I Is an Unreasonable and Unlawful Application of the Complaint Case Statute, R.C. 4905.26.

Out of all the vast arguments presented on both sides of this case by AEP Ohio and NEP, the Commission only accepted one of them: finding in Paragraph 262 of the Opinion and Order that Part 2 of NEP's Count I challenging AEP Ohio's new policy of basing approval of conversions requests on whether a third party submetering company is involved violates R.C. 4905.26 "on a narrow and limited basis" at least "to the extent it applies to NEP." Out of NEP's 107-page Merit Brief and 96-page Reply Brief, it spent less than two pages in each brief

presenting this argument. (NEP Br. at 88-89; NEP Reply Br. at 73-74.) This allegation was clearly not a focus of NEP's efforts in this case, and it was unreasonable, unlawful, and against the manifest weight of the record in this case for the Commission to adopt this contention as the only point it agreed with in the entire case – even on a limited and narrow basis as applied to NEP.

A. The Complaint Case Statute, R.C. 4905.26, Is a Jurisdictional and Procedural Mechanism, Not an Independent Standard that Entities Can "Violate."

The Commission, in adopting this stray argument from NEP, appears to be improperly relying upon R.C. 4905.26 as a source of substantive rights as opposed to its intended purpose as a procedural vehicle to bring a cause of action pursuant to a statute that establishes a substantive right (*e.g.*, R.C. 4905.35). The complaint case statute, R.C. 4905.26, only sets forth the mechanism by which the Commission can adjudicate disputes and change utility practices and tariffs. As the Commission has previously held, the complaint case statute itself does not create any substantive rules that entities can "violate." The violation finding in Paragraph 262 is unlawful and departs from past Commission precedent without explanation or basis – despite AEP Ohio presenting an explicit argument citing precedent on this point. (AEP Ohio Reply Brief 56-57.)

The Commission has previously held that R.C. 4905.26 "operates as the *procedural* vehicle for bringing the complaint before this Commission." *In the Matter of Richard Ihlendorf v. The Cincinnati Gas and Electric Co.*, Case No. 77-862-GE-CSS, Entry on Rehearing at 2 (Feb. 14, 1979) (emphasis added); *see also Ohio Public Interest Action Group, Inc. v. PUCO*, 43 Ohio St.2d 175, 180 (1975). More recently, in the case *In Re Allianz US Global Risk Ins. Co. v. FirstEnergy Corporation*, the attorney examiner found that "the language in Section 4905.26, Revised Code, is entirely procedural in nature. . . [i]t explains what types of claims may be made

in a complaint and, procedurally, how the Commission shall assert its jurisdiction." The Attorney Examiner expressly found that R.C. 4905.26 "does not establish any particular duty to serve," and therefore "there can be no independent claim brought under Section 4905.26, Revised Code." *In Re Allianz US Global Risk Ins. Co. v. FirstEnergy Corp.*, Case No. 05-1011-EL-CSS, Entry ¶ 34 (Aug. 7, 2006). Based on the statutory text and precedent, R.C. 4905.26 is not a statute that can be "violated," as it does not impose an affirmative or independent duty on utilities.

Holding that AEP Ohio "violated" R.C. 4905.26 is like saying the Commission "violates" the appeal statute, R.C. 4903.13, when the Supreme Court reverses or vacates the Commission's order – as it did in *Wingo*. It is like concluding that a utility "violates" R.C. Chapter 4909 when the Commission orders new rates to replace the existing rates (the latter of which were, of course, previously approved by the Commission as being just and reasonable). Rather, the Commission was correct in the *Ihlendorf* case to conclude that R.C. 4905.26 is merely a procedural vehicle for raising concerns before the Commission, and the *Allianz* decision was correct in concluding that the complaint case statute creates no independent claim.

The complaint case statute, R.C. 4905.26, provides:

> Upon complaint in writing against any public utility by any person, firm, or corporation, or upon the initiative or complaint of the public utilities commission, that any rate, fare, charge, toll, rental, schedule, classification, or service, or any joint rate, fare, charge, toll, rental, schedule, classification, or service rendered, charged, demanded, exacted, or proposed to be rendered, charged, demanded, or exacted, is in any respect unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of law, or that any regulation, measurement, or practice affecting or relating to any service furnished by the public utility, or in connection with such service, is, or will be, in any respect unreasonable, unjust, insufficient, unjustly discriminatory, or unjustly preferential, or that any service is, or will be, inadequate or cannot be obtained, and, upon complaint of a public utility as to any matter affecting its own product or service, if it appears that reasonable grounds for complaint are stated, the commission shall fix a time for hearing and shall notify complainants and the public utility thereof. The notice

> shall be served not less than fifteen days before hearing and shall state the matters complained of. The commission may adjourn such hearing from time to time.

Ohio Rev. Code Ann. 4905.26. Simply put, the statute broadly conveys jurisdiction over claims arising under R.C. Title 49 – some of which may involve violations by a public utility and some of which do not involve any violation; the statute simply requires the Commission to provide notice and hearing if the claim states reasonable grounds based on legal or regulatory obligations that are created outside of R.C. 4905.26.

The complaint case statute itself cannot be violated because it does not create a substantive regulatory obligation or independent statutory compliance obligation on a public utility. Rather, the procedural complaint case statute merely references regulatory and legal obligations that exist elsewhere in R.C. Title 49. Thus, although the scope of jurisdiction under this statute broadly encompasses almost any type of Title 49-related claim by or against a public utility, this statute is a procedural vehicle and does not convey unbridled Commission jurisdiction to find a utility "violation" for any policy or practice that the Commission retrospectively disagrees with. Rather than granting jurisdiction to make a separate finding that a utility "violated" R.C. 4905.26 as was done in Paragraph 262, the General Assembly has provided a very different design by conveying jurisdiction to remedy complaints that are found to have merit – based on regulatory and legal obligations that arise elsewhere in R.C. Title 49 (*i.e.*, outside of the complaint case statute).

It is elemental that the Commission is a creature of statute and has only those powers given to it by statute. *See e.g. Columbus Southern Power Co. v. Pub. Util. Comm.*, 67 Ohio St.3d 535, 537 (1993); *Consumers' Counsel v. Pub. Util. Comm.*, 67 Ohio St.2d 153, 166 (1981); *Dayton Communications Corp. v. Pub. Util. Comm.*, 64 Ohio St.2d 302, 307 , 414 N.E.2d 1051 (1980); *Ohio Bell Telephone Co. v. Pub. Util. Comm.*, 17 Ohio St.2d 45, 47 (1969).

The statutory design created by the General Assembly for following up the procedural vehicle of the complaint case statute is through enactment of a corollary statute that creates a substantive regulatory or legal obligation that can be violated (or a regulation or Commission order based on an obligation created outside of R.C. 4905.26). As referenced in detail below, such statutes are numerous in R.C. Title 49 and some of them were relied upon in this case by NEP in advancing its counterclaims. But Paragraph 262 of the Opinion and Order conflicts with this statutory scheme because the Commission – retrospectively and without a reasonable basis – found AEP Ohio "violated" the complaint case statute itself, R.C. 4905.26. The Commission's unlawful approach here is especially unreasonable given that no underlying violation of a statute, tariff, regulation, or Commission order exists according to the explicit findings of the Opinion and Order. In reality, the General Assembly created an integrated and deliberate design where the multiple bases for substantive violations are referenced throughout R.C. Title 49 (outside of R.C. 4905.26) can be adjudicated through the procedural complaint case statute – without either the need for, or the possibility of, a violation of the complaint case statute itself.

The complaint case statute and corollary provisions unequivocally contemplate and authorize the Commission to fashion a remedy *with or without* any underlying violation by a public utility. Ordering a new rate, tariff, or regulation is a common outcome of a complaint case. As will be shown, the Commission could certainly have implemented a reasonable and lawful tariff directive as an outcome under the complaint case statute in order to address consumer harms without any need to find that AEP Ohio violated anything at all. Frankly, issuance of guidelines to be applied on a case-by-case basis was always the approach taken by the Commission in the past when it addressed submetering practices in establishing the *Modified Shroyer* test and prior guidelines addressing submetering practices. Because the *Shroyer* and

Modified Shroyer tests have always involved a case-by-case inquiry, it is illogical and unfair to conclude that a utility violated any statutory duty by not recognizing an uncertain outcome of such a legal dispute. But more to the point here, the Commission erred when it unlawfully and unreasonably found that AEP Ohio violated the complaint case statute itself.

In this case, the most pertinent corollary remedial statute to the complaint case statute is R.C. 4905.37. Although AEP Ohio separately challenges the specific tariff directive adopted in this case (as discussed below), this statute does support a lawful and reasonable tariff directive after conducting a hearing under the complaint case statute. That statute provides:

> Whenever the public utilities commission is of the opinion, after hearing had upon complaint or upon its own initiative or complaint, served as provided in section 4905.26 of the Revised Code, that the rules, regulations, measurements, or practices of any public utility with respect to its public service are unjust or unreasonable, or that the equipment or service of such public utility is inadequate, inefficient, improper, insufficient, or cannot be obtained, or that a telephone company refuses to extend its lines to serve inhabitants within the telephone company operating area, the commission shall determine the regulations, practices, and service to be installed, observed, used, and rendered, and shall fix and prescribe them by order to be served upon the public utility.

R.C. 4905.37. Thus, under R.C. 4905.37, the Commission has authority to make necessary changes and prescribe them by order if it finds, after a hearing held upon complaint under R.C. 4905.26, that the practices of the public utility are unjust or unreasonable. *Norman v. Pub. Util. Comm*., 62 Ohio St.2d 345, 350 (1980).

Under R.C. 4905.37, the Commission can simply "determine the regulations, practices, and service to be installed, observed, used, and rendered, and shall fix and prescribe them by order to be served upon the public utility." R.C. 4905.37. There is no need – nor is it reasonable – to establish an underlying violation by a public utility as a predicate to adopting a remedy under R.C. 4905.37; more importantly, there certainly is no contemplation of any underlying violation being of the complaint case statute itself. Similarly, R.C. 4905.38 provides specific

Commission jurisdiction to order utility repairs, improvements, or additions when the Commission is of the opinion that those actions "should reasonably be made" *after* conducting a hearing under R.C. 4905.26. Nowhere in these statutes does the General Assembly contemplate or authorize the Commission finding that a utility violated the complaint case statute. In short, there is no basis to conclude that the General Assembly contemplated or authorized the potential for a finding of a utility "violation" of the complaint case statute that retrospectively creates a regulatory obligation or liability without an underlying breach of an established standard of conduct under a statute, tariff, regulation, or prior Commission order.

As referenced above, there are *numerous* other similar statutes in R.C Title 49 that consistently reinforce this deliberate design by the General Assembly. *See, e.g.*, R.C. 4905.73 (the Commission has jurisdiction to fashion any of the specified remedies upon finding in a complaint proceeding under R.C. 4905.26 that a public utility violated R.C. 4905.72); R.C. 4928.36 (the Commission has jurisdiction to fashion specified remedies upon finding in a complaint proceeding under R.C. 4905.26 that a public utility violated R.C. 4928.33); R.C. 4929.04(F) (the Commission has jurisdiction to fashion specified remedies upon finding in a complaint proceeding under R.C. 4905.26 that a public utility violated R.C. 4929.04(E) or a separation plan or code of conduct prescribed under the provision); R.C. 4911.19 (the Commission may find in a complaint proceeding under R.C. 4905.26 that a public utility violated R.C. 4911.19 without further evidence if the utility fails to comply with the obligation imposed by that statute); R.C. 4928.18(B) (the Commission has jurisdiction to fashion remedies specified in R.C. 4928.18(C) upon finding in a complaint proceeding under R.C. 4905.26 that a public utility violated R.C. 4928.17); R.C. 4929.041(F) (the Commission has continuing jurisdiction to enforce conditions adopted in granting a regulatory exemption under this provision and modify

the conditions in a complaint proceeding under R.C. 4905.26 if service quality is adversely affected); R.C. 4929.04(F) (the Commission has jurisdiction to fashion remedies specified upon finding in a complaint proceeding under R.C. 4905.26 that a public utility violated a separation plan or code of conduct prescribed under the provision); R.C. 4939.06 (the Commission has jurisdiction to order a just and reasonable public way fee upon finding in a complaint proceeding under R.C. 4905.26 that a public way fee adopted by a municipal corporation is unreasonable, unjust or unlawful).

All of these statutes that are corollary to R.C. 4905.26 contemplate applying substantive regulatory and legal obligations that arise from statutory provisions outside of the complaint case statute (and potential violations of those obligations) when adjudicating a claim under the complaint case statute. By contrast, neither R.C. 4905.26 nor any of the statutes in Title 49 that cross-reference R.C. 4905.26 contemplate a violation of the complaint case statute itself. Indeed, no statute in R.C. Title 49 contemplates a violation of R.C. 4905.26.

In sum, it was unreasonable and unlawful for the Commission to find in Paragraph 262 that AEP Ohio violated the complaint case statute – even if the Commission characterized the finding "as narrow and limited."

B. It Is Unreasonable to Fault AEP Ohio for Its Actions Following the *Wingo* Complaint Dismissal Because AEP Ohio Faced an Uncertain Legal Issue with No Guidance from the Commission, and AEP Ohio Acted in Good Faith and Simultaneously Brought the Issue to the Commission for Decision.

Section 18 of the Terms and Conditions of AEP Ohio's tariffs have a mirroring effect of only permitting resale activities that are permitted by Ohio law – the tariff provision does not authorize NEP or a landlord to undertake unlawful resale. In addition to the language of Section 18, Section 26 of the Company's Terms and Conditions allowed AEP Ohio to refuse service if a nonresidential customer is doing something unlawful. (NEP Ex. 4 at 9; NEP Ex. 5 at 9; Tr. I at

146.) As AEP Ohio witness Mayhan testified, there is nothing in AEP Ohio's tariff that permits unlawful activity. (Tr. I at 145.) Section 26 supports AEP Ohio's view that unlawful resale is prohibited under the tariff and is a basis to deny NEP's requested conversions. NEP witness Centolella also admitted that under either the old version or current version of Section 18 of AEP Ohio's tariffs, the Company is not required to provide service if it would violate Ohio law. (Tr. V at 965.) After all, as NEP witness Ringenbach also conceded, Ohio law governs if there is a conflict with a filed tariff. (Tr. VI at 1123-24.) And as Commissioner Conway emphatically observed, the facts in this case are "novel and unprecedented" and do not "remotely resemble" the facts presented in prior submetering cases. Opinion and Order, Separate Opinion of Commissioner Conway ¶ 3-4. In reality, after dismissal of the *Wingo* complaint on remand and the lack of a Commission investigation or rulemaking, AEP Ohio was forced to decide how to interpret the "unlawful resale" provision of its tariff. The Commission's previous guidance, the "modified *Shroyer* test," had been eliminated by the Court, and the Commission had provided no replacement test or any other guidance. This situation necessarily demanded that AEP Ohio freshly scrutinize the factual and legal analysis of NEP's request, which AEP Ohio's legal counsel communicated to NEP the day after the *Wingo* decision was issued. (NEP Ex. 89, Ringenbach Direct, Ex. K.)

Significantly, the Opinion and Order itself affirmatively and repeatedly sanctions the same conduct that Paragraph 262 refers to as an unlawful policy change, thus directly severely undercutting the Paragraph 262 finding. Specifically, in rejecting NEP's counterclaims, the Commission repeatedly made significant factual findings: (i) that no underlying violation of an existing legal or regulatory obligation occurred, and (ii) that AEP Ohio's decision to pause the conversions while this case was litigated was reasonable:

- AEP Ohio's actions pertaining to the Apartment Complexes resulting from this open question do not rise to a level sufficient for us to determine it violated R.C. 4905.26 and 4905.35, as alleged by NEP. (Opinion and Order ¶ 88 n.2.)

- While the Stay Entry is evidence that the Commission found AEP Ohio's decision to abruptly deny the conversion requests at the Apartment Complexes to be rash, the Commission does not believe that it was unlawful or unreasonable for AEP Ohio to pause such conversions while awaiting a decision in the remanded *Wingo* case or for other Commission guidance. (Opinion and Order ¶ 256.)

- It was not an unreasonable decision to pause new conversion requests such as NEP's at the Apartment Complexes, while believing that older, already-approved requests such as at Bantry Bay and Ponderosa Village should not be halted. (Opinion and Order ¶ 278.)

- As outlined above, it was not illogical for the Company to have concerns that converting the Apartment Complexes could result in violations of its own tariff. AEP Ohio limited the scope of the conversions it would resist until it gained clarity from the Commission via this Complaint. (Opinion and Order ¶ 281.)

- As reiterated throughout these conclusions, the Commission agrees with AEP Ohio that, given the circumstances, it was not unreasonable to oppose third-party submetering while it sought a determination from the Commission in the wake of the *Wingo* remand. (Opinion and Order ¶ 287.) This conclusion was based on the principle discussed in *Allnet Communications Serv., Inc. v. Pub. Util. Comm.*, 70 Ohio St.3d 202, 207 (1994), that discrimination is not prohibited *per se* but is only if without a reasonable basis.

- Commissioner Conway in his separate opinion also emphatically observed that "none of the fact patterns that underlaid any of the precedents … remotely resembled the highly sophisticated and large-scale third-party model that NEP has deployed in Ohio through its contracts with the Apartment Complexes' landlords. (Opinion and Order, Separate Opinion of Commissioner Conway ¶ 3; *see also id.* ¶¶ 8-9 (the novel and unprecedented facts of this case substantially alter the inquiry by rendering the first two prongs of *Shroyer* essentially irrelevant and without much meaning).)

Each and every one of these record-based substantive findings severely undercut Paragraph 262's conclusion that AEP Ohio violated the complaint case statute by adopting a policy to deny conversion requests by property owners that utilize third-party submetering companies. In conflict with the Paragraph 262 finding, these findings confirm that: (i) there is no underlying standard-of-conduct violation that would support granting relief under the complaint case statute,

and (ii) AEP Ohio's "policy" of pausing large scale, third-party conversion requests during the pendency of this case was reasonable.

Either decision AEP Ohio could have made after the *Wingo* remand and dismissal – to either unilaterally abandon its customers to NEP or deny the conversion – was problematic. AEP Ohio took the actions it did in an attempt to preserve the *status quo* for adjudication and to get guidance from the Commission. If AEP Ohio had gone ahead with the conversion, the Commission would likely have had no opportunity to address the submetering legal issues absent a complaint being filed by a tenant. In any case, the Commission would presumably decline to rule as it did after it issued a "stay" ordering AEP Ohio to complete the conversions during the complaint case only to unfairly find the issue "moot" in its Opinion and Order. Opinion and Order ¶ 231. The "damned if you do and damned if you don't" situation forced AEP Ohio to proactively present the issues to the Commission through a complaint case filing – the same remedy the Opinion and Order repeatedly endorses as the correct procedural path. *See* Opinion and Order ¶ 262 (filing a complaint case is the appropriate recourse); *id.* ¶ 299 (AEP Ohio's complaint had reasonable grounds and was a "viable, lawful option"); *id.* ¶ 302 (filing a complaint was the "appropriate recourse"). Because there was no previous finding that NEP's large scale third party submetering practices were lawful, AEP Ohio acted in good faith and did not violate any established standard. Indeed, the Supreme Court remanded that very issue for the Commission, and the Commission dismissed the *Wingo* remand without a determination on that issue. As referenced by the numerous findings in the Opinion and Order and Commissioner Conway's separate opinion, this was an unprecedented situation and the Company's interpretation of its tariff under the circumstances presented as prohibiting large-scale third-party submetering was reasonable.

In further support of its Paragraph 262 finding of a complaint case statute violation, the Commission cites two of its own decisions in two complaint cases involving CEI as precedent where it admonished parties' after-the-fact attempts to justify denial of consumer requests. Ultimately, citing to the Commission's prior case decisions that were not challenged on rehearing or appeal does not establish any binding legal precedent that AEP Ohio should have known about or followed. But even assuming *arguendo* that the decisions are lawful and reasonable, they do not support Paragraph 262's finding of a violation of the complaint case statute here.

As a threshold matter, in the same paragraph, the Opinion and Order characterizes AEP Ohio's policy as an intentional "blanket denial policy" that was implemented "in the midst of this dispute," on the one hand, and yet as an after-the-fact justification, on the other hand. Separately, it is counterfactual to characterize AEP Ohio's denial of NEP's conversion requests as an after-the-fact justification – the denial was issued and explained in writing contemporaneous to AEP Ohio proactively filing the complaint to initiate this case. And of course, the Commission ultimately found in multiple places in the Opinion and Order that the pausing of third-party conversions was fact-based and reasonable. *See e.g.*, Opinion and Order ¶¶ 256, 278, 281, 287.

Moreover, the two CEI cases referenced in Paragraph 262 as examples of retrospective admonition are distinguished in several respects. In *Cleveland Metropolitan School District v. Cleveland Electric Illuminating Company*, 18-1815-EL-CSS (*CMSD* Case), in stark contrast to the case at bar, the Commission characterized the dispute as a pricing dispute under a tariff that neither party disputes the customer was eligible to take service. *CMSD*, Opinion and Order ¶ 85. The Commission also found in the *CMSD* Case that the tariff provision involved was unambiguous. *Id*. ¶ 94. In the instant case, by contrast, the dispute goes far beyond pricing and the tariff prohibits "unlawful resale" which is necessarily not a self-executing provision or

unambiguous. In finding in favor of the Complainant on one count in the *CMSD* Case, the Commission concluded that CEI's decision requiring the customer to pay 100% of the costs "was unjust and unreasonable, pursuant to R.C. 4905.22 and R.C. 4905.26," and used the same phrase at the end of the order in its findings of fact and conclusions of law. *Id*. ¶¶ 105, 115. Thus, the Commission did not make a separate or disconnected finding that the utility violated R.C. 4905.26 but only found that billing the customer full costs "was unjust and unreasonable" and could collectively be remedied "pursuant to R.C. 4905.22 and R.C. 4905.26." Admonishing parties for after-the-fact justifications is one thing – as was done in the *CMSD* Case – but finding that a utility violated the complaint case statute without any underlying violation of a statute, rule, or order is quite another; for this important reason, Paragraph 262's reliance on the *CMSD* Case is misplaced and does not support the statutory violation finding.

The second CEI complaint case cited in Paragraph 262 is *Schumann v. Cleveland Electric Illuminating Company*, 17-473-EL-CSS (*Schumann* Case), where the Commission simply found that CEI's denial of service under an unambiguous tariff was unjust and unreasonable. *Schuman* Case, Opinion and Order ¶¶ 50, 62. The *Schumann* decision did not make any findings of a statutory violation, let alone a violation of the complaint case statute. Even leaving aside the fact that neither the *CMSD* Case nor *Schumann* Case was subjected to rehearing or appeal, the Opinion and Order's apparent reliance on the Commission's own untested precedent fails to offer any support for Paragraph 262's finding that AEP Ohio violated the complaint case statute.

It is also counterfactual for the Commission in Paragraph 262 to conclude that the violation occurred "at the very least to the extent it applies to NEP." No impact or harm of the policy was applied to NEP in light of the interim relief granted in the Stay Entry and the Company's completion of the conversions before the merit decision. Until the Opinion and

Order was issued and only after the "intense and in depth review" as referenced in Paragraph 262, was any determination made that large-scale third-party submetering was lawful in light of the *Wingo* remand. Moreover, according to the Commission, the master meter tariff relied upon by the Commission applies to the landlord as the customer, not a third-party "agent." Opinion and Order ¶¶ 184, 194. Thus, the tariff was not applied to NEP according to the Opinion and Order and there was no application of the policy to NEP due to the Stay Entry. In those respects, the violation finding in Paragraph 262 is unreasonable, against the manifest weight of the record and conflicts with other explicit findings contained in the Opinion and Order.

Later in Paragraph 262, the Commission also states after again affirming that the conversion pause was reasonable that "there was no doubt the [NEP] conversion request was the catalyst that initiated the policy change." In reality, the record shows that there were other NEP conversion requests before the Five Apartments and there were other NEP requests after the Five Apartments – so it is not the case that the NEP requests were the true catalyst. Opinion and Order ¶¶ 278 (Bantry Bay and Ponderosa Village were processed before the *Wingo* decision and were not discriminatory); *id.* ¶ 311 (Northtowne conversion request was submitted after the complaint was filed). And the manifest weight of the evidence confirms that the *Wingo* remand decision is the real catalyst for the Company's denial, as was explained many times in the record and acknowledged elsewhere in the Opinion and Order. *See, e.g.*, Opinion and Order ¶ 256 (not unreasonable for AEP Ohio to pause conversions while awaiting a Commission decision after *Wingo* remand because that decision created uncertainty as to NEP's status as a public utility); *id.* ¶ 282 (AEP Ohio was equally focused on AP&L properties and other submetering companies and there was no evidence of AEP Ohio discriminating specifically against NEP); *id.* ¶ 287 (AEP Ohio treated all submetering companies the same in the wake of the *Wingo* remand and NEP was

not singled out or targeted). In any case, the import of this diffuse observation is unclear, and it does not incrementally explain or justify anything additional to support the violation finding.

Finally in Paragraph 262, the Commission states that it is ironic that the policy change was imposed "in the midst of this dispute" and vaguely observed that it "seems to run contrary to AEP Ohio's desire to wait for further Commission guidance on this issue." There are several flaws in this finding and, again, the Commission does not explain how the (flawed) observation even supports any statutory violation. AEP Ohio never communicated that it wanted to wait on a Commission ruling before taking any action – it is more accurate to say that the Company needed to preserve the *status quo* for existing AEP Ohio customers that were the subject of potential conversion requests for a Commission determination and actively sought such a determination before it would become moot. AEP Ohio was very clear about its opposition to the Stay Entry and reasons for bringing the complaint. AEP Ohio Memorandum Contra NEP's Motion for a Stay at 3-4 (Dec. 17, 2021) (AEP Ohio's approach was intended to preserve the *status quo* for existing customers by denying third-party submetering conversion requests while simultaneously challenging the legality of such conversion requests through the proactive filing of the Complaint). Absent the Company's denial of the service requests based on a good faith application of its Commission-approved tariff prohibiting unlawful resale, the matter would not have been addressed by the Commission because either the dispute would not exist or it would be moot without AEP Ohio's policy stance. Opinion and Order ¶ 231. So it is unreasonable and counter-factual for Paragraph 262 to suggest that AEP Ohio has a desire to wait that ran counter to taking actions to preserve the issue for decision.

C. The Commission Denied AEP Ohio Its Right to Due Process of Law by Finding that AEP Ohio "Violated" a Rule That Did Not Exist at the Time.

As discussed above, R.C. 4905.26 does not impose any substantive rules that a public utility can "violate." It is simply a procedural statute. For example, R.C. 4905.26 does not prohibit "unjustly discriminatory" practices "relating to any service furnished by the public utility"; it states that a complaint alleging that a public utility has engaged in "unjustly discriminatory" practices should be set for hearing "if it appears that reasonable grounds for complaint are stated." R.C. 4905.26. Similarly, the statute does not prohibit "unreasonable" practices "relating to any service furnished by the public utility"; it says that complaints alleging that a public utility's practices are "unreasonable" should be set for hearing "if it appears that reasonable grounds for complaint are stated." Thus, it is incorrect to hold, as the Commission did (*see* Opinion and Order ¶ 262), that AEP Ohio's policy for converting existing complexes to master-meter service "violates R.C. 4905.26" because the Commission concluded that policy was "unfounded and unreasonable." Even if AEP Ohio's policy was "unfounded and unreasonable," which AEP Ohio contests, adopting that policy cannot have violated a statute that does not, *itself*, prohibit unfounded or unreasonable policies.

Holding that R.C. 4905.26 *independently* imposes a "reasonableness" standard, and that AEP Ohio's policy violated that standard, would render the statute unconstitutionally vague. "The void-for-vagueness doctrine reflects the principle that 'a statute which either forbids or requires the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.'" *Roberts v. U.S. Jaycees*, 468 U.S. 609, 629 (1984) (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926)); *see also City of Norwood v. Horney*, 2006-Ohio-3799, ¶¶ 86-87 (a civil statute that "substantially affects … fundamental constitutional rights" is "void for

vagueness" if it does not "afford[ ] a reasonable individual of ordinary intelligence fair notice and sufficient definition and guidance to enable him to conform his conduct to the law"). A statute that simply prohibited any public utility practice that the Commission found "unreasonable," without enumerating any factors against which to judge the reasonableness of the practice, would almost certainly be void for vagueness if the statutory scheme imposed penalties for "unreasonableness." *Compare State v. Carrick*, 2012-Ohio-608, ¶ 20 (holding that a statute that prohibited "unreasonable" noise was not "unconstitutionally vague" because it "enumerate[d] specific factors … with which to judge the level of the disturbance"). Allowing the Commission to penalize the public utility for an "unreasonable" practice without showing that the public utility knew (or should have known) the action was unreasonable would raise additional constitutional concerns. *See id.*¶ 21 (noting that the noise statute in question there "require[d] a culpable mental state of recklessness").

Similarly, in the absence of an established standard based in a statute, lawful rule, or Commission order, it is unreasonable and unlawful to form a statutory violation based purely on retroactively disagreeing with the Company's good faith actions in attempting to apply its Commission-approved tariff. A utility is constantly required to interpret and apply its tariffs, and it cannot reasonably be considered a statutory violation to do so. Doing so is akin to unlawful retroactive ratemaking. As the Commission well knows, a central tenet of R.C. Title 49 prohibits retroactive ratemaking. *Keco v. Cincinnati & S. Bell Tel. Co.*, 166 Ohio St. 281, 256-57 (1957); *In re Application of Columbus S. Power*, 2014-Ohio-462, ¶ 49; *In re Columbus S. Power*, 2011-Ohio-1788, ¶ 16; *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 2009-Ohio-604, ¶ 21, *Green Cove Resort I Owners' Assn. v. Pub. Util. Comm.*, 2004-Ohio-4774, ¶ 27; *Lucas Cty. Commrs. v. Pub. Util. Comm.*, 80 Ohio St.3d 344, 348 (1997); *Office of*

Consumers' Counsel v. Pub. Util. Comm., 61 Ohio St.3d 396, 409 (1991). That principle is based on the fact that ratemaking is a quasi-legislative function and cannot be exercised retroactively. Under the same principle, it would also be unlawful for the Commission to make retroactive changes to tariffs and regulations. The Company's tariff – approved by the Commission as just and reasonable in the Company's last base distribution rate case, Case No. 20-585-EL-AIR – prohibits unlawful resale.

Exposing AEP Ohio to treble damages for an action that the Commission had not previously found to be unlawful creates additional constitutional concerns. Section 4905.61 of the Ohio Revised Code states:

> If any public utility … does, or causes to be done, any act or thing prohibited by Chapters 4901., 4903., 4905., 4907., 4909., 4921., 4923., and 4925. of the Revised Code, or declared to be unlawful, … or by order of the public utilities commission, such public utility … is liable to the person, firm, or corporation injured thereby in treble the amount of damages sustained in consequence of such violation … .

R.C. 4905.61. Under that statute, a party may file suit for treble damages against a public utility after a "determination by the Public Utilities Commission that the utility violated a *designated* public utilities statute or commission order." *Cleveland Mobile Radio Sales, Inc. v. Verizon Wireless*, 2007-Ohio-2203, ¶ 21 (citations omitted; emphasis added). Thus, the Commission's after-the-fact admonition and retrospective finding that AEP Ohio's policy "violated R.C. 4905.26" may allow NEP to pursue treble damages in state court (but only if, of course, NEP could demonstrate that the policy injured it).

That would be fundamentally unfair. As the Supreme Court of Ohio has recognized, "R.C. 4905.61 is a penalty statute." *Id.* ¶ 1. It "was designed to deter public utilities from committing regulatory violations and to punish them for failing to comply with the provisions set forth in R.C. Chapter 49." *Id.* ¶ 20. That is why "[b]ringing suit for treble damages against a

utility … is dependent upon a finding that there was a violation of a *specific statute* … or an order of the commission." *Milligan v. Ohio Bell Tel. Co.*, 56 Ohio St.2d 191, 194 (1978). AEP Ohio simply had no way of knowing the Commission would reach its after-the-fact admonition based on the case-by-case approach always used in the past to address submetering issues.

Finally in this regard, the Ohio General Assembly imposed an analogous requirement on actions for treble damages under the Ohio Consumer Sales Practices Act. The Consumer Sales Practices Act (CSPA) states that "[n]o supplier shall commit an unfair or deceptive act or practice in connection with a consumer transaction." R.C. 1345.02(A). If a supplier violates this statute, a consumer may bring suit to recover his damages. R.C. 1345.09(A). Treble damages (up to $200) are only available if the Ohio Attorney General had previously declared that specific "act or practice to be deceptive or unconscionable by rule[,]" or if a court had previously determined that the specific act or practice violates the CSPA and the Ohio Attorney General had posted that court decision in the "Public Inspection File." R.C. 1345.09(B).

Under both statutes – R.C. 4905.61 and the CSPA – fair notice of the law's requirement is a necessary predicate to treble damages. And that makes sense from a policy perspective. Penalties cannot deter an action that no public utility *knows* is a regulatory violation. And penalizing a public utility for an action that the Commission has only just determined to *be* a violation would be fundamentally unjust. "Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *BMW of N. Am. v. Gore*, 517 U.S. 559, 574 (1996) (overturning an excessive punitive damages award).

Here, nothing in R.C. Chapter 49, or the Commission's regulations, explicitly prohibits an electric distribution utility from adopting a policy of not converting existing apartments to master-meter service if they utilize third-party submetering companies like NEP. The Commission's opinion in this case is the first time the Commission has determined that such a policy is unreasonable. AEP Ohio could not have known that its policy would be found unlawful and had good reason to believe that the policy was, in fact, fully in line with the *Wingo* decision. *See* Opinion and Order ¶ 256 ("there was a genuine outstanding question as to whether NEP would be deemed to be operating as a public utility at the Apartment Complexes"). Finding that AEP Ohio's policy nonetheless violated R.C. 4905.26, and exposing AEP Ohio to a suit for penalties under R.C. 4905.61, would be fundamentally unfair and a violation of due process.

D. A Finding that AEP Ohio "Violated" R.C. 4905.26 Is Not Necessary to Reach the Same Result in This Case Including the Decision to Direct Changes to AEP Ohio's Practices or Tariff.

Moreover, finding a violation of R.C. 4905.26 was an unnecessary predicate to the remedy that the Commission imposed. Unlike R.C. 4905.61, which rightly requires a Commission finding that a public utility violated a specific statute or order before an Ohio court may impose treble damages, the Commission does not need to find a violation of a public utility statute before it orders a public utility to modify its practices. It only needs to find that the policy was "unreasonable" under R.C. 4905.37 to order relief:

> Whenever the public utilities commission is of the opinion, after hearing had upon complaint ... , served as provided in section 4905.26 of the Revised Code, that the … practices of any public utility with respect to its public service are *unjust or unreasonable*, … the commission shall determine the … practices … to be … observed ... and shall fix and prescribe them by order to be served upon the public utility. After service of such order such public utility and all of its officers, agents, and official employees shall obey such order and do everything necessary or proper to carry it into effect.

R.C. 4905.37 (emphasis added). The Commission has, in fact, taken this approach numerous times in resolving complaint cases without a violation finding. *Donahey, Jr. v. Ameritech Ohio*, Case No. 94-1954-TP-CSS, Opinion and Order, 1996 Ohio PUC LEXIS 14 (Jan. 18, 1996) (finding, in a complaint regarding respondent's calling cards, that the complainant had not met its burden of proof, but nonetheless ordering the respondent to provide additional notices to cardholders on the back of the calling cards). Similarly, if AEP Ohio brought a self-complaint and asks the Commission to change its tariff or rates because they are unjust and unreasonable, and the Commission agrees, it is not as if AEP Ohio has "violated" R.C. 4905.26. More to the point here, the Commission has never made a finding that a utility violated R.C. 4905.26 without an underlying violation of a statute or order.

As discussed above, AEP Ohio contests the Commission's finding that AEP Ohio's master-meter conversion policy was "unfounded and unreasonable" (Opinion and Order ¶ 262) and believes that finding should be reversed. Nonetheless, that finding was a sufficient basis to order AEP Ohio to terminate its master-meter conversion policy under R.C. 4905.37. Taking the additional step of declaring AEP Ohio's policy to be a violation of a purely procedural complaint statute was unreasonable and unlawful. On rehearing, the Commission should withdraw or reverse its finding that AEP Ohio violated R.C. 4905.26 – especially since the complaint case statute violation was completely superfluous to the sole remedy adopted by the Opinion and Order in this case (the tariff directive).

II. *Second Ground for Rehearing:* The "Electric Reseller Tariff" Ordered by the Commission Is Unlawful Under the Commission's Own Interpretation of "Electric Light Company" Under R.C. 4905.03(C), Violates the Statutory Rulemaking Procedures in R.C. Chapter 106, and Results in an Unreasonable Tariff Paradigm.

Despite finding that it lacks jurisdiction to regulate NEP, the Commission attempts to implement protections for the unfortunate tenants that become submetered by their landlord or

third party. Specifically, the Commission orders AEP Ohio to file tariffs requiring that (1) a landlord's lease agreement contain a notice in all capital letters that the tenant agrees to have the landlord secure and resell electricity and that the customer will no longer be under the Commission's jurisdiction; (2) the landlord's resale of electricity is at an amount the same or lower than what a similarly situated SSO customer would pay; and (3) the landlord's disconnection of service to a tenant will follow the rules set forth in Ohio Adm. Code 4901:1-18 (collectively referred to as "Tariff Directive"). Opinion and Order ¶ 224. AEP Ohio applauds the Commission's acknowledgement of the protections that tenants lose when they are submetered by a landlord (under the judicially-established landlord-tenant exception) or by a large-scale third-party submetering company (under the Opinion and Order's jurisdictional conclusions) as well as the Commission's desire to protect that vulnerable population. But the solution of implementing a test nearly identical to what the Supreme Court of Ohio previously overturned and effectively implementing new master-metering rules without due process is unlawful and unreasonable.

Parties that will be impacted by this decision, including but not limited to AEP Ohio, were not given the requisite opportunity to be heard on these changes, which will result in discriminatory application of the Tariff Directive. This Solomon-like "split the baby" approach has also thrust AEP Ohio into an untenable position of having to police an immeasurable number of private entities (landlords/submetering companies) over which AEP Ohio retains no control and fails to solve for the jurisdictional conundrum of enforcing the Tariff Directive. For these reasons, the Commission's decision requiring AEP Ohio to implement the Tariff Directive is unreasonable and unlawful.

A. The Commission's Reinstatement of the "SSO Price Test" Through a Tariff Contravenes the Express Instructions of the Supreme Court's Remand Order in *Wingo*.

The last time the Commission made a determination related to the resale of public utility service, the Supreme Court of Ohio made it abundantly clear that comparing the price of resold service to the price of the standard service offer cannot be used by the Commission as the test of whether to exercise jurisdiction over submetering. *Wingo*, 2020-Ohio-5583, ¶ 24. Yet, the Commission has done exactly that by requiring AEP Ohio to implement a tariff that prohibits "resellers" from charging tenants more than "a similarly situated customer served by the applicable utility's standard service offer ("SSO Price Test")." Opinion and Order ¶ 224.

In *Wingo*, the Commission was faced with determining whether it had jurisdiction to rule on a complaint case brought against NEP (and others) for the resale of public utility services. Opinion and Order ¶ 4. While the Commission had previously employed the *Shroyer* test to determine whether it had jurisdiction over such matters, in the *Wingo* case, the Commission adopted two modifications to the *Shroyer* test ("modified *Shroyer* Test"):

> (1) creat[ing] a presumption . . . that a reseller is a public utility if it charges a customer more for utility services than the customer would pay 'the local public utility under the default service tariff for the equivalent usage on a total bill basis;'" and
>
> (2) a reseller can "rebut this presumption by showing that one of two safe harbors applies—either (1) the reseller is 'simply passing through its annual costs of providing a utility service charged by a local public utility" or (2) "the [r]eseller's annual charges for a utility service * * * do not exceed what the resident would have paid the local public utility for equivalent annual usage, on a total bill basis, under the local public utility's default service tariffs.'"

Id. ¶¶ 12-13. Based upon the modified *Shroyer* Test, the Commission found that NEP was not a public utility. *Id.* ¶ 14.

In reversing the Commission's determination, the Supreme Court of Ohio found that "whether someone is 'harmed' isn't a jurisdictional question; it is a merits question that can be

answered ***only after*** it is determined that an activity falls within the PUCO's jurisdiction." *Wingo*, 2020-Ohio-5583, ¶ 23 (emphasis added). In so holding, the Court reminded the Commission that "defining the parameters of the PUCO's jurisdiction is up to the General Assembly, not the PUCO," and remanded the case back to the Commission "to determine whether it has jurisdiction based upon the jurisdictional statute, not the modified *Shroyer* test." *Id.* ¶¶ 24, 26.

Despite this direction, the Commission now disclaims jurisdiction over resellers while at the same time attempting to address harms of residential tenants that it found were not customers under the Commissions' jurisdiction. The Commission acknowledges the shocking loss of rights and protections that are afforded to residential customers of regulated utilities to ensure that they "receive adequate, safe, and reasonable electric service, as required by law." Opinion and Order ¶ 224. But in finding "that NEP is not a public utility and therefore not subject to our jurisdiction" the Commission was forced to also find that it "lack[ed] the power to directly regulate NEP's actions." *Id.* Astonishingly, however, the Commission goes on to require regulations through AEP Ohio's tariffs applicable to landlords and submetering companies engaged in reselling, including a requirement that "[t]he landlord's charges for resale of electricity to each tenant must be the same or lower than the total bill for a similarly situated customer served by the applicable utility's standard service offer." *Id.* Commissioner Conway, in offering his "alternative approach" to indirect regulation, would give NEP even more leeway by allowing them to markup the price 10% above what they pay to AEP Ohio when reselling to tenants. Opinion and Order, Separate Opinion of Commissioner Conway, ¶¶ 5, 7.

Tariffs, however, are terms and conditions of utility service that are enforceable by the utility, its customers, and the Commission. Therefore, under the Commission's ruling in this

case, so long as submetering companies (such as NEP) and landlords do not charge more than the SSO, they will be outside the Commission's reach. At this point, the logic already begins to break down because in the very same order the Commission already found that it lacked jurisdiction to regulate the actions of resellers like landlords and submetering companies. Moreover, if a landlord or submetering company does charge more than the SSO (and violates the tariffs that AEP Ohio has been ordered to establish) the landlord can presumably be brought before the Commission via a complaint case. That is exactly the jurisdictional paradigm the Supreme Court struck down in *Wingo*. This paradigm also contradicts the Supreme Court's direction that the Commission is only to weigh in on the merits of the amount that submetered customers pay after it has been determined that the activity falls within the PUCO's jurisdiction. But the Commission had already disclaimed jurisdiction over the resale of public utility service.

The Commission reasons that it has "authority to set reasonable terms and conditions on jurisdictional utilities providing master meter service so as to ensure that users of that service, such as landlords, are providing it to the ***ultimate end user*** in a manner which is safe and consistent with the public interest." Opinion and Oder ¶ 224 (citing *Brooks v. Toledo Edison Co.*, Case No. 94-1987-EL-ATA, Opinion and Order at 16 n.12 (May 8, 1996)). To support this decision the Commission points to "ample precedent where we have exercised our authority over public utilities' tariffs ***to ensure adequate consumer protections*** are included in such tariffs." Opinion and Order ¶ 225 (emphasis added). The precedents to which the Commission refers, however, are the gas choice protections from twenty-five years ago. In those cases, the Commission approved pilot programs (and the accompanying protections) whereby ***customers of the regulated natural gas utilities*** could choose their supplier of natural gas. But such analysis is inapposite and inconsistent with the Commission's finding in this matter that "the landlord of

each of the Apartment Complexes and not the tenant is the 'consumer.'" Opinion and Order ¶ 184. Therefore, it is plainly unreasonable and unlawful to order the SSO Price Test when the Commission had already disclaimed jurisdiction and found that the resellers, not tenants, are the consumers that fall under Commission protection.

B. By Ordering the "Electric Reseller Tariff," the Commission Expanded the Scope of Its Disconnection Rules (OAC 4901:1-18) and Enacted Other Rules of General Applicability Without Following the Statutory Rulemaking Procedures in R.C. Chapter 106.

Despite finding it had no jurisdiction, the Commission manufactured a solution to protect master-metered residential tenants by requiring AEP Ohio to issue tariffs that mandate certain language in master-metered lease agreements, implementing the SSO Price Test, and requiring the disconnection procedures of Ohio Adm. Code 4901:1-18. In doing so the Commission has improperly amended and expanded its rules and discriminatorily applied them without due process.

1. The Commission Did Not Provide Adequate Notice and Opportunity to Be Heard.

As ordered by the Commission, the Tariff Directive will apply generally to ***all*** master-metered tenants in AEP Ohio's service territory. This would include countless numbers of landlords and numerous submetering companies such as NEP, American Power and Light, and others. Our courts have long recognized that due process requires those parties that have the potential to be impacted by a government action are first provided notice and an opportunity to be heard. *In Re Thompkins*, 2007-Ohio 5238, ¶ 13. Yet, no third-party submetering entity or landlord had notice or an opportunity to be heard regarding these proposed changes as they were not parties to this action. But even those that were parties to this case – AEP Ohio and NEP – were deprived of their ability to be heard on the Tariff Directive.

Neither AEP Ohio nor NEP advocated for or otherwise commented on the Commission-created Tariff Directive, which did not first arise until the Commission's Opinion and Order. It comes as no surprise, therefore, that the record is devoid of any evidence to support that the proposed "solution" (in the form of the Tariff Directive) will actually protect master-metered tenants or is possible for AEP Ohio and/or landlords/submetering companies to enact. The record did establish, however, that NEP was not affording many of these protections to the five apartment complexes at issue here. (AEP Ohio Ex. 1C, Lesser Direct, at 53-54 (loss of metering/billing rights); *id.* at 55-61 (loss of rate protections and shopping rights); *id.* at 70-73 (loss of payment plan rights and PIPP protections); *id.* at 79-82 (loss of disconnection protections)). Therefore, it stands to reason that landlords and submetering companies will be substantially impacted by these changes. It was unreasonable and unlawful for the Commission to require such tariff changes without first providing those impacted parties adequate notice and opportunity to be heard.

2. The Commission Discriminatorily Ordered Protections for Certain, but Not All, Tenants in the State of Ohio.

The Commission unreasonably and unlawfully ordered significant changes to AEP Ohio's tariffs that will discriminatorily impact landlords, submetering companies, and residential tenants of the state. Because this was a finite case involving AEP Ohio, the Commission has naturally only ordered that ***AEP Ohio*** amend its tariffs to afford tenants certain protections. Opinion and Order ¶ 224. As such, the Tariff Directive will only be applied to landlords and submetering companies that do business in the AEP Ohio service territory. It is a matter of public record that submetering companies including NEP are operating in other EDU territories. *See generally Duke Energy Ohio, Inc. v. Nationwide Energy Partners, LLC*, Case No. 22-279-EL-CSS,

Complaint (Mar. 30, 2022). Thus, only those tenants in the AEP Ohio service territory will be afforded the Tariff Directive at the exclusion of other tenants in other utility territories.

Putting aside the jurisdictional problem of requiring tariffs when the Commission held that it does not have jurisdiction over the resellers, there is no reason the Tariff Directive should only be applicable to one electric distribution utility. Overarching consumer protections, like the Tariff Directive is something that is better suited for the Commission's administrative rules so that they are applicable to all utility customers of the state. The very purpose of the administrative code provisions applicable to electric companies is to "to promote ***safe and reliable service to consumers*** and the public, and to provide minimum standards for ***uniform and reasonable practices***." OAC 4901:1-10-02(A)(2) (emphasis added). Protections such as the minimum customer service levels (4901:1-10-09), customer rights and obligations (4901:1-10-10), and disconnection rules (4901:1-10-18) are just a few of the protections that are afforded ***uniformly*** to all customers of the state.

The Tariff Directive is equivalent customer protections and even invokes some of those very rules. The Commission even acknowledges that "[t]he record of this case demonstrates clear need for ***reasonable terms and conditions*** on the resale of public utility service" (Opinion and Order ¶ 224 (emphasis added)), not just in the AEP Ohio service territory. Yet, the Commission only ordered AEP Ohio to implement such tariffs. Such protections (and express amendments to existing rules) are more appropriate for a rule making proceeding where they can be assessed for reasonableness after all interested/impact parties have had an opportunity to be heard and the rules can be equally and ***uniformly*** applied across the state rather than just certain service territories. It is unreasonable and unlawful to apply the Tariff Directive discriminatorily to tenants that are subjected to resold electricity in the AEP Ohio service territory only.

3. The Commission Failed to Follow Mandatory Statutory Procedures Required to Amend the Administrative Rules.

Even if the Commission had jurisdiction to mandate the Tariff Directive, the Commission acted unlawfully and unreasonably when it failed to follow the robust statutory procedures that are required to amend its rules. As previously established, all three protections in the Tariff Directive are the functional equivalent of instituting new regulations, yet the Commission bypassed that process. Even if there is doubt that the lease notice and SSO Price Test are rule amendments (they are the functional equivalent), there is no doubt that the Commission is expressly amending 4901:1-18 by requiring that "landlord[s] must follow the same disconnect standards applicable to landlords under Ohio Adm. Code Chapter 4901:1-18" when "engaging in the disconnection of electric service to a tenant for nonpayment of charges related to electric usage." Opinion and Order ¶ 224. Ohio Adm. Code 4901:1-18-08 already contains disconnection provisions that are applicable to landlord-tenant circumstances, albeit abbreviated compared to what regulated utilities must afford to their residential customers under Ohio Adm. Code 4901:1-18-06.

Under the Commission's ruling in this case, however, the Commission nebulously obviates Ohio Adm. Code 4901:1-18-08 (without any specific textual amendments) in exchange for the regulated utility disconnection protections throughout the rest of the section (without clarity as to which of the seventeen sections are applicable). The following is an example of some of the protections that landlords and submetering companies would presumably be required to afford to residential customers in the AEP Ohio service territory that are not currently required for master-metered tenants:

- Personal notice on the day of disconnect (OAC 4901:1-18-06(A)(2))).
- Extended pay agreements (OAC 4901:1-18-06(A)(4)).

- Specific notification information such as the utility's toll-free number to contact about their account, a statement containing information about het PUCO call center, and the contact information for the Office of the Ohio Consumer's counsel (OAC 4901:1-18-06(A)(5)).

- Limitations on disconnection between the dates of November 1 through April 15 (OAC 4901:1-18-06(B)).

- Limitations on disconnection where there is a medical certification related to circumstances where it would be especially dangerous to the health of any consumer at the premises or operation of necessary medical or life-supporting equipment impossible or impractical (OAC 4901:1-18-06(C)).

While AEP Ohio agrees that regulated protections are paramount for residential customers, the Commission failed to make the necessary jurisdictional findings and likewise failed to follow the statutory processes required before an Ohio administrative rule may be changed. As an initial step, the Commission did not give public notice of any rule change or afford those impacted by a proposed rule a chance to comment. *See* R.C. 119.03; *see also Fairfield Cty. Bd. of Commrs. v. Nally*, 2015-Ohio-991, ¶ 36. The Supreme Court has acknowledged that "'[t]he rulemaking requirements set forth in R.C. Chapter 119 are designed to permit a full and fair analysis of the impact and validity of a proposed rule' before it is imposed upon the regulated community." *Nally*, 2015-Ohio-991, ¶ 36 (citing *Condee v. Lindley*, 12 Ohio St.3d 90, 465 N.E.2d 450 (1984)). Nor did the Commission perform a business impact analysis to determine if there will be any adverse impact on any businesses, which will likely be quite significant. *See* R.C. 121.82. And the Commission failed to provide the full text of the proposed rules to the joint committee on agency rule review ("JCARR") at least sixty-five days in advance of any implementation. *See* R.C. 106.02; R.C. 111.15(D). In fact, the Commission did not even provide AEP Ohio with the full text of the rules change, instead leaving AEP Ohio to independently figure out how the rule should be changed to align with the Opinion and Order. Finally, there is no indication that the Commission performed the requisite fiscal analysis for

submission to JCARR – failure to do so requires JCARR to reject the filing. R.C. 106.024(B) & (C); R.C. 111.15(D).

Failure to follow these procedures to implement the Tariff Directive was unreasonable and unlawful. AEP Ohio is harmed by this error since the Commission places the Company in the middle of its indirect regulation scheme. The Company is understandably resistant to being placed in a position of interpreting and applying the Commission's tariff provisions without guidance, being placed in the position of acquiring liability for retrospective determinations that the Commission disagrees with the Company's good faith efforts, and being saddled with the burden of litigating complaint cases at its own expense in order to address case-by-case issues that arise under the tariffs.

C. It Is Unlawful and Exceeds the Commission's Statutory Jurisdiction Under R.C. 4905.03(C) for the Commission to Conclude that NEP (and Landlords) Are Not "Electric Light Companies" and Yet Regulate Them Through AEP Ohio's Tariff's as if They Were.

Once the Commission (incorrectly) concluded that neither NEP nor landlords are "electric light companies" under R.C. 4905.03(C), or otherwise "public utilities," then the Commission ceased having any jurisdiction to regulate them. Yet the Tariff Directive does precisely that: it regulates NEP and landlords who submeter and resell electric service to tenants.

As discussed above, the Commission can adopt wide-ranging regulations governing "public utilities," such as the gas choice regulations discussed above. The Commission can adopt narrow tariff provisions that address the conduct of those who purchase electricity from AEP Ohio, but these are limited to issues such as ensuring customers do not create a safety hazard on AEP Ohio's system. The Commission's regulation of NEP and landlords through AEP Ohio's tariff, however, goes far beyond this. The Tariff Directive imposes "utility-like" regulations that govern *how much they may charge for electricity* or *how they may disconnect for*

nonpayment. This kind of authority can only be exercised if the Commission finds that an entity is an "electric light company" under R.C. 4905.03(C).

To demonstrate that the Commission's imposition of utility-like regulations through AEP Ohio's tariff is legally untenable, consider that it has no limiting principle and would lead to absurd consequences if logically extended. The Commission purports to assert authority to set "terms and conditions" in AEP Ohio's tariff to apply the entire set of disconnection regulations in OAC Chapter 4901:1-18 to NEP and landlords who disconnect submetered tenants for nonpayment. Opinion & Order ¶ 224. If this is legally permissible (it is not), may the Commission use AEP Ohio's tariff to extend *all* utility regulations in the Revised Code and Ohio Administrative Code to NEP and landlords who are engaging in "resale"? The Commission's Tariff Provisions require NEP or landlords to charge tenants no more than "the total bill for a similarly situated customer served by the applicable utility's standard service offer." *Id.* If this is legally permissible (it is not), may the Commission instead use AEP Ohio's tariff to require that NEP or landlords submit their rates for the Commission's approval, perhaps after a rate case under R.C. Chapter 49? May the Commission use AEP Ohio's tariff to outright *prohibit* submetering? These questions show that the Commission's legal basis for ordering the Tariff Provisions is flawed. If the Commission wants to protect submetered tenants, it must reach a lawful determination of jurisdiction by finding that NEP is an "electric light company" under R.C. 4905.03(C).

D. The "Electric Reseller Tariff" Is Unworkable for Several Reasons.

While the Commission appears to have tenants' interests at heart, the proposed Tariff Directive is unreasonable and unlawful because the provisions lack the requisite specificity for enactment and potentially leave AEP Ohio in an untenable position of enforcement without cost recovery. By finding that it did not have jurisdiction to address submetering by landlords, the

Commission was left with a problem but no solution. As a result, the Commission extemporaneously, without notice, discussion, or evidence, sought to solve the problem by requiring three specific changes to AEP Ohio's tariffs – the Tariff Directive. Sometimes the best intentions, however, can have dire consequences, as is the case here.

Certainly, the Commission was not tilting at windmills – it expects the tariffs to be actionable and enforceable – but there is no apparent mechanism by which to enforce the tariffs. Typically, utilities are charged with enforcing their own tariffs. Such a structure would be ironic and confounding – during the process of losing its relationship and obligations to existing residential customers to a third-party, AEP Ohio is then required to monitor, police, and regulate those very third-parties over which AEP Ohio has no control. It would be further unlawful and unreasonable to foist the burden and cost on AEP Ohio to regulate the conduct of third-party landlords and submetering companies.

In order to successfully police such a tariff, AEP Ohio would have to gain access, review, and analyze an immeasurable amount of information related to ***all master-metered tenants within the service territory***, including but not limited to the following components of agreements to which AEP Ohio is not a party: private lease agreements, each monthly billing between a third-party landlord and its tenants, disconnection procedures of each landlord/submetering company, and details of each disconnection performed by a reseller. Yet the Commission made no acknowledgement of the Herculean amount of additional effort and costs associated with such endeavors to enforce the proposed tariffs, let alone granting cost recovery. Such an unfunded mandate is unreasonable and unlawful and should not be enacted until and unless the Commission has established clear guidelines for AEP Ohio, including a cost recovery

mechanism, and some assurances against involuntary conscription to additional liability like the Opinion and Order imposes in Paragraph 262.

Alternatively, "any person, firm, corporation, or . . . the public utilities commission" can institute a complaint case pursuant to R.C. 4905.26 to enforce tariff. Complaint cases, however, are limited to filings "against any ***public utility***." R.C. 4905.26 (emphasis added). And the Tariff Directive does not protect against action by the AEP Ohio; they protect against actions of a third-party over which AEP Ohio has no control. Thus, filing a complaint against AEP Ohio would make little sense and have no enforceable resolution. Alternatively, if there is a violation, will the Commission accept complaints from tenants if a submetering company or a landlord violates the tariff? If so, what will be the source of the Commission's jurisdiction to field such complaints, when it has already found that landlords and submetering companies are not acting as utilities and it does not have jurisdiction over those entities?

Aside from lack of a clear path for enforcement, there are a myriad of other pragmatic problems and unanswerable questions (that could have potentially been rooted out and addressed had there been a rulemaking proceeding) that prevents clear implementation. First, it is unclear to whom the tariffs are to apply because the Commission never defines "resale," yet orders that the tariff modifications be applicable to any "resale of electric service from a landlord to a tenant." Opinion and Order ¶ 224. Will this apply to landlords that master meter but do not submeter with their own separate bill; instead, it is included in rent, or simply passed through with an administrative charge?

The lease notice requirement also appears to lack any sort of specificity that would render it anything other than a hollow and ineffective solution. Simply allowing landlords and submetering companies to skirt critical consumer protections by giving notice that they intend to

do so is hardly a protection. But how will AEP Ohio review and control the contracts of third-parties? Requiring a regulated utility to compel third parties to insert specific language (including specific font and typeface) into private unregulated lease agreements reflects how the Commission has reached beyond the jurisdiction established by Title 49.

It is also unclear how the SSO Price Test is to be conducted when it does not account for PIPP, budget billing, payment plans, and a host of other possible scenarios for a "similarly situated customer served by the applicable utility's standard service offer." *Id.* Moreover, the Commission has not established how the "total bill" will be calculated, which is an important detail for conducting the requisite comparison. Without such definition, a landlord or submetering company could easily evade the SSO price test through "community charges" and other bill line items. As the Commission has seen in dealing with a myriad of CRES Provider pricing schemes, it is no simple matter to compare the SSO price with other creative, complex pricing schemes. Indeed, the Commission must look no further than to a myriad of CRES pricing schemes such as the "fixed means fixed" investigation that followed the 2014 polar vortex where the Commission found the importance of "straightforward" language. *In the Matter of the Commission-Ordered Investigation of Marketing Practices in the Competitive Retail Electric Service Market*, Case No. 14-568-EL-COI, Finding and Order at 11-14 (Nov. 18, 2015). Conducting the SSO Price Test as set forth by the Commission will be anything but straightforward for AEP Ohio and the tenants the Commission desires to protect.

The Tariff Directive requirement to implement the disconnection rules set forth in Ohio Adm. Code 4901:1-18 is particularly vague and contradictory. Ohio Adm. Code 4901:1-18 contains seventeen separate rules comprised of forty-five pages of regulations related to termination of residential electric service. The Commission has not clarified which rules should

be applicable to the resale of electric service by landlords and submetering companies. This is particularly confusing because there is already a rule that governs termination of service in a master-metered scenario. Is it safe to assume that rule will no longer be applicable? To the extent the Commission desires the applicability of all rules under 4901:1-18, many of those would appear to be nonsensical in this context. For instance, five out of the seventeen rules govern the administration of the PIPP program, which can only legally be offered by a regulated utility such as AEP Ohio. *See* R.C. 4928.54 *et seq*. Should landlords and submetering companies be required to pay arrangements for customers that would otherwise qualify? *See* Ohio Adm. Code 4901:1-18-13. The disconnection rules also require notification information such as the utility's toll-free number to contact about their account, a statement containing information about the PUCO call center, and the contact information for the Office of the Ohio Consumer's counsel. *See* Ohio Adm. Code 4901:-18-06. Will the Commission's staff field calls and answer questions from submetered tenants? Certainly, it is unreasonable to refer customers to the Commission and the Consumer's Counsel when the Commission already found that they are not consumers over which there is jurisdiction pursuant to Title 49. Moreover, it is unreasonable to refer tenants to their local distribution utility when they have no such account – this is already an issue that AEP Ohio battles (*see* AEP Ohio Ex. 3 at 6-7)[1] and will only serve to cause more confusion for these tenants.

Finally, in asserting jurisdiction over resellers through AEP Ohio's tariffs (despite otherwise disclaiming jurisdiction), the Commission could also cause further jurisdictional confusion potentially depriving Ohio's residential tenants of legal rights to which they may

[1] AEP Ohio witness Williams testified that "AEP Ohio's call center has to field calls from customers that are confused about their electricity provider."

otherwise be entitled. The Supreme Court has long recognized that the "the PUCO has exclusive jurisdiction over most matters concerning public utilities." *Allstate Ins. Co. v. Cleveland Elec. Illum. Co.*, 2008-Ohio-3719, ¶ 5. In *Allstate*, the Supreme court adopted a two-part test to determine whether the Commission has exclusive jurisdiction: (1) whether the Commission's administrative expertise is required in resolving the dispute; and (2) whether the act constitutes a practice normally authorized by the utility. *Id.* at 12-13. The Supreme Court subsequently clarified that the two-prong determination requires a review of whether the substantive claims raise issues that are service-related. *Corrigan v. Illum. Co.*, 2009-Ohio-2524, ¶ 16.

The Tariff Directive appears to establish a paradigm where the Commission is providing certain protections through AEP Ohio's tariffed services and a practice that is normally authorized by the utility. This could be perceived as depriving a common pleas court of jurisdiction over these types of services. Indeed, less than a year ago the Tenth District Court of Appeals upheld a dismissal of a lawsuit brought by NEP on the basis that the trial court lacked jurisdiction over common law tort claims because the claims involved electric service-related inquiries. *Nationwide Energy Partners, LLC v. Ohio Power Company*, 2022-Ohio-4099, ¶¶ 16-22. Thus, the Tariff Directive could equally lead a common pleas court to determine that it lacks jurisdiction over tenant claims against resellers because such claims involve/overlap with utility tariffed service. Such a determination could deprive tenants of meaningful protections under other statutory protections such as the Consumer Sales Practices Act, which should otherwise be applicable to a non-regulated entity.

By disclaiming jurisdiction over the resale of electric service, the Commission divested itself of jurisdiction to impose any regulations on that industry. The Commission's attempt to protect tenants by resurrecting the SSO Price Test flies directly in the face of the *Wingo* decision

from just a few years ago. The Commission also abridged the due process protections afforded to those that are impacted by this decision, which will be discriminatorily applied. Imposing half-measures will only serve to further confuse jurisdiction, place tremendous burden on AEP Ohio, and potentially harm a number of unknown parties, including tenants, that were not afforded an opportunity to heard.

III. *Third Ground for Rehearing*: The Commission's Application of the Jurisdictional Statute, R.C. 4905.03(C), to NEP Is Legally and Factually Erroneous.

On AEP Ohio's claims, the Commission determined that NEP is not "engaged in the business of sup plying electricity or light, heat, or power purposes to consumers" under R.C. 4905.03(C) and therefore is not an "electric light company" or "public utility" subject to the Commission's jurisdiction. That conclusion was contrary to the plain meaning of the statutory text and based on an untenable reading of the factual record in this proceeding.

A. The Commission's Definition of "Consumer" in R.C. 4905.03(C) Is Contrary to That Term's Plain Meaning.

The Commission's first ground for holding that NEP is not "engaged in the business of supplying electricity or light, heat, or power purposes to consumers" under R.C. 4905.03(C) was that tenants are not "consumers." (Opinion & Order ¶ 184-197.) That interpretation of the statue was incorrect. Under the plain meaning of the words of the statute, submetered tenants must be "consumers."

Where, as here, "a term is not defined in the statute, we give the term its plain and ordinary meaning." *State v. Bertram*, 2023-Ohio-1456, ¶ 11. "In determining the ordinary meaning of the term," courts often "look to dictionary definitions." *State ex rel. Int'l Ass'n of Fire Fighters v. Sakacs*, 2023-Ohio-2976, ¶ 18; *City of Athens v. McClain*, 2020-Ohio-5146, ¶ 30. *Merriam-Webster Dictionary* defines "consumer" as "one that consumes, such as one that

utilizes economic goods."[2] *Merriam-Webster* provides five definitions of "consume," the most pertinent of which is "to utilize as a customer."[3] The *Oxford English Dictionary* defines "consumer" as "[a] person who uses up a commodity; a purchaser of goods or services, a customer."[4]

Applying the dictionary definitions of "consumer," there is no question that a submetered tenant is a "consumer" of electricity. Electric service is an "economic good," and the tenant "utilizes" and "uses up" this economic good in her apartment. She turns on her electric lights so she can see, uses her electric toaster or oven to cook food, and powers her electric tv to be entertained. The tenant also "utilizes" electric service as a "customer." *Merriam-Webster* defines "customer" as "one that purchases a commodity or service." The tenant's electric usage is metered by NEP, NEP sends her a bill, and she pays NEP based on how much electricity she has used. Thus, the tenant "purchases" every kilowatt-hour of electricity she utilizes in her apartment. The submetered tenant, therefore, is a "customer" who "utilizes" the economic good of electricity. Under the ordinary meaning of "consumer" as described in the dictionary, the submetered tenant is a "consumer" of electricity.

That the word "consumer" must be defined to include submetered tenants is confirmed by examining what changes – or, rather, what *does not* change – when a building is converted to submetering. On *Day One*, before conversion, a tenant uses electricity in her home to power her

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[2] https://www.merriam-webster.com/dictionary/consumer. *Merriam-Webster* also provides a second definition of "consumer" that is not pertinent here: "an organism requiring complex organic compounds for food which it obtains by preying on other organisms or by eating particles of organic matter."

[3] https://www.merriam-webster.com/dictionary/consume. The other four definitions all connote *using up* or *using all* of something – for example, "to spend wastefully," "to do away with completely," "use up," "to eat or drink especially in great quantity," or "to enjoy avidly." To apply these definitions here, it is the tenant who "uses up" the electricity. If the landlord were to "use it up," there would be nothing left to resell to the tenant.

[4] https://www.oed.com/search/dictionary/?scope=Entries&q=consumer.

lights, tv, dishwasher, hairdryer, etc., and the tenant pays AEP Ohio based on her electric usage. On *Day One*, therefore, the tenant must be a "consumer" as that term is defined in R.C. 4905.03(C), and AEP Ohio is "engaged in the business of supplying electricity" to the tenant as a "consumer" under that statute. No one disputes that AEP Ohio is a public utility on *Day One*, and the Commission indisputably has jurisdiction over the sale of electricity from AEP Ohio to the tenant/consumer. On *Day Two*, after the apartment building is converted to submetering, the tenant still uses electricity in her home in the exact same way as on *Day One*. She still turns on light switches, turns on her tv, uses her hairdryer, etc., and now the tenant pays NEP based on her electric usage. Nothing has changed about how the tenant *consumes* electricity. Applying the dictionary definition of "consumer" and "consume" described above, the tenant "utilizes the economic good" of electricity in the same way on *Day One* and *Day Two*. There is no basis, therefore, to apply the term "consumer" in R.C. 4905.03(C) differently on *Day One* and *Day Two*. The tenant must be a "consumer" under R.C. 4905.03(C) both before and after conversion to submetering. AEP Ohio made this *Day One* / *Day Two* argument in its post-hearing briefs (AEP Ohio Br. at 146-47; AEP Ohio Reply at 25), and the Commission did not address it.

Instead of focusing on the plain meaning of "consumer," the Commission relied on Ohio Supreme Court cases that applied the term "consumer" to *landlords*, but not tenants. Although these cases held that landlords are "consumers" in submetered buildings, not one of the cases addressed whether the tenants are ***also*** "consumers" in submetered buildings. For instance, paragraph 193 of the Opinion & Order focuses on one sentence from *Pledger v. Public Utilities Commission*, 2006-Ohio-2989, stating that there is no authority that "supports the assertion that in a landlord-tenant relationship, it is the tenant rather than the landlord who is the consumer of the commodity provided by a water-works utility." *Pledger*, 2006-Ohio-2989, ¶ 35. The

Commission takes this sentence to mean that a tenant cannot, in any circumstance, be a "consumer." (Opinion & Order ¶ 194.) But *Pledger* did not hold this. The only question in *Pledger* was whether the *landlord* was a consumer and, therefore, whether the Commission had jurisdiction to regulate the sale between a public utility such as AEP Ohio and the landlord's master meter. *Pledger* did not address a claim that the landlord was a "public utility," and of course *Pledger* did not address a third-party submetering company such as NEP at all. Therefore, *Pledger* did not address whether there are circumstances in which the tenant is ***also*** a "consumer" (*i.e.*, the landlord and tenant are both "consumers"), and any statements in that regard are merely *dicta*. *Cf.* Opinion & Order, Separate Opinion of Commissioner Conway ¶ 6 (recognizing there is a "point" at which "the landlord also is no longer the only 'consumer' in the master-meter/submetering arrangement; the tenant becomes a "consumer" also").

Moreover, the Commission's interpretation of *Pledger* and the other cases was incorrect because the Commission's interpretation cannot be reconciled with the Court's reasoning in *Wingo*, the most recent case to address submetering and the only case to address third-party submetering companies such as NEP. *Wingo* was aware of the *Pledger* decision, citing it numerous times and explaining its meaning over three paragraphs. *See Wingo*, 2020-Ohio-5583, ¶¶ 18-21. Yet if *Pledger* stands for the proposition that tenants are never "consumers," then NEP and other third-party submetering entities could *never* be "public utilities." Why didn't *Wingo* just say that? Why did *Wingo* remand the question of whether NEP is a "public utility" to the Commission with precise instructions "to apply R.C. 4905.03 and determine whether NEP is an 'electric light company' . . . "in the business of supplying" any of the covered services"? *Wingo*, 2020-Ohio-5583, ¶ 26. The only possible explanation is that *Pledger* did not foreclose a finding that tenants are "consumers"; in fact, it did not address that question at all. Put differently: Here

the Commission determined that in *Pledger* and all the other cases cited, the Court already held that "consumer" cannot mean a tenant in a submetered building. But the Court itself rejected that notion in its most recent decision, *Wingo*, by remanding the case to the Commission to develop a factual record and conduct a new interpretation of the jurisdictional statute, R.C. 4905.03(C), as it applies to NEP.

The same point about inconsistency applies to the Commission's previous investigation of submetering and the Commission's modified *Shroyer* test—those decisions would have been pointless (and obviously unlawful) if, as the Commission now asserts, *Pledger* held that submetered tenants can never be "consumers." That is, if *Pledger* held that submetered tenants are never "consumers," then the Commission's investigation would have been pointless because there was never any basis for the Commission to assert jurisdiction over NEP or any submetering practices. Indeed, NEP made that precise argument, and the Commission, citing *Pledger,* expressly rejected it:

> NEP contends that the Court has supplied the necessary interpretation of these statutes in the context of landlord submetering arrangements, in that the landlord is not in the business of supplying such utility services, *but is itself the consumer of such services supplied by the jurisdictional utility*.
>
> Rehearing on these assignments of error should be denied. As noted above, the statutory definitions in R.C. 4905.02 and 4905.03 are not self-applying to the landlord-tenant relationship. *Pledger*, 109 Ohio St.3d 463, 466. Therefore, the Commission *must weigh the facts and circumstances of each case*, and our consideration of whether any individual Reseller is a public utility must be made after the development of an evidentiary record in a complaint case.

Second Order on Rehearing ¶¶ 30-31, *In re Commission's Investigation of Submetering in the State of Ohio*, Case No. 15-1594-AU-COI (June 21, 2017) (emphasis added). The Commission's holding here – that a submetered tenant is never a "consumer" – is an about-face from the Commission's reasoning in the submetering investigation. Instead of "weigh[ing] the facts and circumstances of each case" after "the development of an evidentiary record in a complaint

case," *id.* ¶ 31, the Commission here made a blanket legal ruling (tenants are not "consumers") that does not depend on the facts or the well-developed evidentiary record in this case (and is legally incorrect). There were no grounds for the Commission to reject its prior, correct approach of basing its decisions on the facts of each case. Indeed, the Commission's prior, correct approach was precisely what *Wingo* instructed the Commission to do when the Court stated that "application of the relevant legal standards to the facts is one that is best left to the PUCO in the first instance." *Wingo*, 2020-Ohio-5583, ¶ 26.

The Commission attempts to reconcile its interpretation of "consumer" with the *Wingo* remand in two ways. First, the Commission states that it "was tasked with establishing a factual record . . . after which, and only after which, [the Commission] could then make legal conclusions, such as potentially finding that the specific landlord in that case qualified as the 'consumer' under R.C. 4905.03(C)." (Opinion & Order ¶ 95.) That reasoning is flawed. As noted above, the Commission's interpretation of "consumer" in the Opinion & Order was not based on the "factual record" in this case but rather the Commission's reliance on *Pledger* and the other cases cited. In holding that the tenants of the Apartment Complexes are never "tenants," the Commission did not examine any of the facts in the lengthy record developed in this case. Rather, the Commission reached its interpretation of "consumer" based solely on prior precedent and based on generic reasoning that would apply in *any* submetering situation. That is not what *Wingo* ordered the Commission to do.

Second, the Commission attempts to reconcile its interpretation of "consumer" with *Wingo* on the ground that *Wingo* "partially granted a motion to dismiss, thereby striking from consideration in its ultimate decision Ms. Wingo's proposition of law that '[s]ufficient evidence exists to find that NEP is a 'public utility.'" (Opinion & Order ¶ 95.) Is the Commission

reasoning that *Wingo* did not remand the issue of whether NEP is a "public utility" to the Commission? That is at odds with the *Wingo* decision. As for the "partially granted" motion to dismiss, it is hard to tell what part of the *Wingo* decision the Commission is referring to, given that paragraph 195 of the Opinion and Order (where the Commission makes this point) does not include a paragraph or page number citation to *Wingo*. The only time the *Wingo* Court addressed the Commission's decision to grant a motion to dismiss under Rule 12(b)(6) is at the end of the opinion where the Court addressed Appellant Wingo's argument that the Commission improperly considered facts outside the pleadings. The Court, however, did not uphold this dismissal or endorse it in any way. Rather, the Court declined to address this argument as moot: "In light of our remand to the PUCO to apply the proper jurisdictional test, this matter does not present a live controversy." *Wingo*, 2020-Ohio-5583, ¶ 26. The Court then made clear that it "reverse[d] the PUCO's decision dismissing Wingo's complaint and remand[ed] the cause for further hearing." *Id.* ¶ 29. Nothing in *Wingo* endorsed the Commission's dismissal of the complaint in that case. And nothing in *Wingo* allowed the Commission to ignore the factual record here and hold that tenants are never "consumers" in any submetering configuration – a holding that, if correct, *Wingo* could have easily made itself, obviating any need for this lengthy and resource-intensive proceeding.

If, instead, the Commission had followed the *Wingo* remand mandate and its prior precedent of examining each case on its facts, the Commission would have found that the factual record here shows that there are *multiple* consumers in submetering arrangements—the landlord at the master meter *and also* the tenants at their apartments. The record shows that landlords do "consume" some of the electricity delivered to the master meter to power the landlord's office, pools, lights, and other common areas and amenities. (*See* NEP Ex. 90, Ex. G, at G-9 (CCSA §

1.4.1); AEP Ohio Ex. 1, Lesser Direct, at 59, 61; Tr. V at 983.) But the tenant also "consumes" electricity in the tenant's own apartment. It is the tenant who turns on and enjoys lights, televisions, ovens, hairdryers, etc. That is true on *Day One*, before conversion to submetering, where the tenant is indisputably a "consumer," and on *Day Two*, after conversion, when the tenant remains a "consumer." Moreover, NEP installs a meter for each tenant's apartment, and bills the tenant for her individual usage. NEP does not install individual meters to measure the *landlord's* usage at each apartment; that does not make sense. Rather, NEP's meter measures *the tenant-consumer's* usage at her apartment, and NEP bills the tenant (not the landlord) for that usage. (*See* NEP Ex. 90, Ex. G, at G-24 to G-26 (CCSA Ex. D); NEP Ex. 90, Ex. G, at G-9 (CCSA § 1.4.2).) This means that NEP itself (and the landlord) regard the tenant as the consumer of the electricity used in her apartment, and it confirms that the tenant remains a "consumer" after the conversion to submetering.

There is a final, yet critical, reason the Commission's interpretation of "consumer" is in error: The Commission's interpretation of "consumer" is inconsistent with the Commission's regulation of submetering through the new "electric reseller tariff" the Opinion & Order (¶ 224) ordered AEP Ohio to establish. The very language the Commission uses in describing the new tariff demonstrates the errors in the Commission's interpretation of "consumer." The Commission calls the new tariff an "electric *reseller* tariff." (Opinion & Order ¶ 224 (emphasis added).) If NEP or the landlords are "resellers," whom are they *reselling* to? They are reselling to the tenants, which makes the tenants "consumers." Moreover, the Commission justifies the new tariff because "the Commission shares many of the concerns articulated by AEP Ohio regarding *consumer* protections." (Opinion & Order ¶ 223 (emphasis added).) Over and over, the Commission uses the word "consumer" in explaining the new tariff. (*See id.* ¶¶ 222-24.)

The section of the Opinion & Order in which the Commission creates the new tariff is entitled "*Consumer* Harm." (*Id.* ¶ 223 (emphasis added).) Elsewhere the Commission calls tenants the "ultimate end users" of electricity. (*Id.* ¶¶ 224.) This demonstrates the inconsistency of the Commission's reasoning. If tenants are not "consumers" under R.C. 4905.03(C), then the Commission has no jurisdiction to regulate the "resale" of electricity to tenants or to impose "consumer" protections related to these sales. Rather than mince words and rest on inconsistences, the Commission should, instead, recognize that the tenants are "consumers" of electricity (*i.e.*, the "ultimate end users") under the plain meaning of that word, and the Commission should protect those "consumers" by exerting jurisdiction over the sale of electricity by NEP to those consumers.

B. The Commission's Conclusion that NEP Is Not "Engaged in the Business of Supplying Electricity" Under R.C. 4905.03(C) Is at Odds with the Plain Meaning of "in the Business of" and "Supplying" and Incorrectly Credits Formalisms Such as "Agency" That Cannot Be Found in the Statute.

The Commission's second ground for holding that NEP is not "engaged in the business of supplying electricity or light, heat, or power purposes to consumers" under R.C. 4905.03(C) is the Commission's conclusion that NEP is not "engaged in the business of supplying electricity." (Opinion & Order ¶¶ 197-216.) As with the first ground, the Commission's statutory interpretation on its second ground was erroneous. Under the plain meaning of the words of the statute and the overwhelming factual record in this proceeding, NEP is clearly "engaged in the business of supplying electricity." R.C. 4905.03(C).

Throughout this proceeding, AEP Ohio has urged the Commission to focus on *substance over form* when applying R.C. 4905.03(C). (*See, e.g.*, AEP Ohio Initial Br. at 91-116; AEP Ohio Reply Br. at 16-30; AEP Ohio Ex. 1, Lesser Direct, at 9.) As AEP Ohio has pointed out, *substance over form* is an approach grounded in the statute. "Engaged" and "supplying" are

active verbs. When deciding whether an entity is a "public utility," it should not matter what an entity *calls* itself, but what an entity *does*. It should not matter what an entity *says*, but what activity the entity is "*engaged in*." R.C. 4905.03(C) (emphasis added). It should not matter what *words* are used in a contract, but what *actions* that contract requires the entity to perform. An entity should not be able to avoid regulation as a public utility merely by signing a piece of paper, or by any other formalisms devised by lawyers. (This is especially so where, as here, an entity quickly scrambles to sign new, meaningless formalisms *after the complaint is filed.*) What matters is the *substance*. Is an entity doing the kinds of things that "public utilities" do? Does the entity essentially *step into the shoes* of a public utility when a building converts to submetering? In short, is the entity "engaged in the business of supplying electricity . . . to consumers"?

Here, as AEP Ohio detailed at length in its Initial Brief (at 50-83, 91-116) and Reply Brief (at 16-30), the record contains numerous, undisputed facts showing that NEP *does* step into AEP Ohio's shoes and *is* "engaged in the business of supplying electricity . . . to consumers." These facts include, but are not limited to, the following:

- *Installing Equipment* – NEP installs meters and all other necessary distribution equipment at the property using its own money (not the landlord's). (NEP Ex. 90, Ex. G, at G-7 (CCSA § 1.1.3); Tr. VI at 1047; *see also* NEP Ex. 90, at G-12 (CCSA § 1.7).)

- *Maintenance and Repairs* – NEP maintains and repairs meters and other distribution equipment using its own money (not the landlord's). (NEP Ex. 90, Ex. G, at G-7 (CCSA § 1.2.1).)

- *Conversion* – NEP is responsible for all aspects of working with AEP Ohio to convert AEP Ohio's individual-meter residential service to master-meter service. (NEP Ex. 90, Ex. G, at G-7 (CCSA § 1.1.4); NEP Ex. 90, Ex. G, at G-7 (CCSA § 1.1.4); NEP Ex. 90, Ex. G, at G-33 (Meter Install. Agmt. Cover Sheet); AEP Ohio Ex. 3, Williams Direct, at 23.)

- *Buying Master-Meter Service* – NEP is required to pay all bills related to master-meter service, including AEP Ohio's bill and the CRES provider's bill. (NEP Ex.

90, Ex. G, at G-9 (CCSA § 1.3.5). NEP pays AEP Ohio bills for over 150 accounts totaling more than $8.5 million annually. (AEP Ohio Ex. 3, Williams Direct, at 7.) NEP has unfettered discretion over whether to use a CRES provider and which provider to choose. (NEP Ex. 90, Ex. G, at G-8 (CCSA § 1.3.2).)

- *Reading Meters* – NEP is responsible for reading meters on a regular basis. (NEP Ex. 90, Ex. G, at G-9 (CCSA § 1.4.1).)

- *Setting Rates* – NEP does not follow the landlord's instructions regarding rates but rather builds its rate for individual usage into its form contract. (AEP Ohio Ex. 1, Lesser Direct, at 62-63.)

- *Sending Bills* – NEP bills tenants for electric service. NEP designs its bills, which prominently feature NEP's name and information. (NEP Ex. 90, Ex. G, at G-9 (CCSA § 1.4.2).)

- *Offering Payment Plans* – NEP has unfettered discretion to determine what plans to offer. (NEP Ex. 90, Ex. G, at G-11 (CCSA § 1.4.6).)

- *Customer Service* – NEP maintains a customer service center to field customer calls about service, billing, and other topics related to the provision of electric service. (AEP Ohio Ex. 1C, Lesser Direct, at 87-88.)

- *Disconnection* – NEP disconnects for nonpayment. (Tr. VI at 1096; AEP Ohio Ex. 1C, Lesser Direct, at 85-86.)

These are the *indicia* of an entity operating as a "public utility." These are the things a company does if it is "engaged in the business of supplying electricity . . . to consumers." R.C. 4905.03(C).

The Commission's decision, however, does not engage with any of these facts. Instead, the Commission focuses on a legal formalism – *agency* – that ignores what NEP *actually does*. Broken down to its essential elements, the Commission's reasoning is as follows:

(1) Under existing precedent, the landlords of the Apartment Complexes may resell electricity to the tenants themselves without being "engaged in the business of supplying electricity . . . to consumers" under R.C. 4905.03(C).

(2) NEP is the agent of the landlords.

(3) Therefore, despite all the evidence showing NEP has the *indicia* of an entity operating as a "public utility," NEP is not "engaged in the business of supplying electricity . . . to consumers" under R.C. 4905.03(C).

Although this reasoning is flawed in several respects, the most important flaw is that Step (3) does not follow from Steps (1) and (2).

As the Commission recognizes, previous cases have held that landlords are often not "in the business of supplying electricity . . . to consumers" when they resell electric service to their tenants. The principal reason for this conclusion is the Court's finding that landlords, in general, are in "the business" of being *landlords*, not in "the business" of supplying electricity. *Wingo* explained: "Thus, if metering services are completely ancillary to a business—say a building owner who simply passes on electricity costs as a convenience to its tenants—it would seem fair to say that the landlord is not "an electric light company" and is not "engaged in *the business* of supplying electricity." *Wingo*, 2020-Ohio-5583, ¶ 17 (emphasis in original). This is the landlord-tenant exception to R.C. 4905.03(C) that, as the Commission correctly recognized, AEP Ohio is not asking the Commission to overrule.[5]

The flaw in the Commission's "agency" reasoning was that the Commission incorrectly assumed, without analysis, that if a landlord is not in "the business" of supplying electricity, then neither is the landlords' purported agent, NEP, in "the business" of supplying electricity. That does not follow. It is undisputed that NEP is not in "the business" of being a landlord. There is no sense in which supplying electricity is "ancillary" to NEP's business—it is, rather, the very core of NEP's business, which NEP conducts at numerous properties in AEP Ohio's service territory. (*See, e.g.*, AEP Ohio Ex. 3, Williams Direct, at 7 (explaining that "there are over 150

[5] AEP Ohio reserves the right to make any argument concerning these past Supreme Court cases concerning the landlord-tenant exception and other Supreme Court precedents on appeal, including asking the Supreme Court to revisit and overrule its precedents, if appropriate.

accounts where bills are sent to NEP at their corporate address for over $8.5 million in annual charges" and that NEP serves approximately 1.75% of AEP Ohio's entire residential customer base).) Insofar as the Commission examined NEP's business, all the facts pointed to NEP being in "the business" of supplying electricity to the tenants. *See* Opinion & Order ¶¶ 198-206. Yet the Commission repeatedly dismissed these *indicia* of an entity operating as a public utility because NEP is purportedly the landlord's "agent." That is a red herring. Even if NEP is the landlord's "agent," the Commission must still examine what NEP does, and whether NEP itself is in "the business" of supplying electricity. As explained above, it clearly is.

The Commission also erred in crediting facts showing that NEP changed its relationship to the landlords during the proceeding. The record clearly shows that when AEP Ohio filed this complaint, the CCSA provided that NEP was the owner of the "Meter Equipment." (*See* AEP Ohio Initial Br. 56-57; NEP Ex. 90, Ex. G, at G-15 (CCSA § 5.1).) Yet several months after AEP Ohio filed this complaint, NEP and the property owners signed the Amendment and Supplement purportedly transferring ownership of the Meter Equipment to the property owners. (NEP Ex. 90, Ex. G, at G-42, G-84, G-128, G-172, G-217.) The Commission should have based its decision on the facts as they existed when AEP Ohio filed its complaint. Regardless, the Commission also erred in reasoning that "ownership" was important in deciding whether NEP is "engaged in the business of supplying electricity . . . to consumers" under R.C. 4905.03(C). An entity can engage in a business even if it *rents* its equipment or otherwise has the right to *use* equipment. AEP Ohio would be no less a "public utility" if it rented its distribution infrastructure or otherwise rested formal ownership of its distribution infrastructure in another entity.

There is another reason why the Commission erred in dismissing all the facts showing NEP is in "the business" of supplying electricity on the ground that NEP is an "agent" of the

landlord – namely, the special legal status of principals does not automatically confer to their agents. As AEP Ohio previously explained in its Initial Brief (at 110-111) and its Reply Brief (at 35-36), this kind of "legal status transfer" has no basis in the "black letter agency law" that NEP cited in support of its agency theory.

The concept of a principal's special legal status automatically transferring to agents makes no sense and would be completely unworkable if it were true. Consider, for instance, the example that AEP Ohio has twice presented in this case (Initial Br. at 110-111; Reply Br. at 35): An attorney licensed to practice law. An attorney may hire a non-attorney agent to enter into contracts on the attorney's behalf, but that agency relationship does not give the non-attorney agent the right to practice law. Indeed, the agency-law cases that NEP cites hold that a third-party can enforce a contract signed by the non-attorney agent against the attorney, but that in no way suggests that the non-attorney agent is now licensed to practice law. In the same way, landlords may be entitled to a certain treatment when they themselves submeter their tenants (*i.e.*, the traditional landlord exception to R.C. 4905.03(C)), but this special status does not automatically transfer to NEP if it is the landlord's agent. Instead, NEP must be evaluated on its own. Despite AEP Ohio prominently raising this argument[6] (Initial Br. at 110-111; Reply Br. at 35) – that legal status does not transfer from principal to agent – the Opinion & Order failed to address it.

[6] As AEP Ohio has pointed out (Reply Br. at 36), there are myriad other examples demonstrating that a principal's special legal status *does not* transfer automatically to its agents. A licensed doctor does not create additional licensed doctors by hiring agents; rather, anyone who practices medicine is treated separately under the law, and must be separately licensed, regardless of whether they are an agent of a doctor. If a nurse crosses the line from "nursing" to "practicing medicine," it is no defense that the nurse is the doctor's agent. Other examples abound. An entity that qualifies for a special tax abatement does not automatically transfer that abatement to its agents. A gambling company that is authorized to accept sports wagers in Ohio does not create additional authorized gambling companies by hiring agents. An agent of a worker eligible for worker's compensation payments is not entitled to the same payments herself because she is an agent of the eligible worker.

In support of the "agency" theory, the Opinion & Order (¶ 211) reasoned that AEP Ohio regularly hires agents, and this does not mean that these agents become "public utilities."[7] That reasoning is incorrect. Insofar as AEP Ohio hires agents, it is for limited projects or purposes. For instance, AEP Ohio may hire an agent to construct certain infrastructure, or to provide a specified service like tree trimming. These agents are clearly not "engaged in the business of supplying electricity . . . to consumers" because they handle only one small aspect of AEP Ohio's business, and that alone is not enough to be "in the business" of supplying electricity. This is not the situation for NEP. The facts show that NEP handles essentially *all aspects* of supplying electricity to tenants; the landlord's involvement is largely limited to signing a contract with NEP and sharing profits at the expense of tenants. If AEP Ohio did that – that is, if AEP Ohio hired a company-agent to take over essentially *all aspects* of AEP Ohio's business – that company-agent probably *would be* "engaged in the business of supplying electricity . . . to consumers" and therefore a public utility. The point is the Commission must examine each entity on its own, for what it does. If an entity does all the things a public utility does, then it is a public utility, regardless of whose "agent" it may be. And that is what AEP Ohio has demonstrated here by developing a comprehensive record of all the activities that NEP does that make it a public utility. It is no answer – and legally irrelevant – to say that NEP may have been an "agent" of landlords (or anyone else) while doing those things.

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[7] The Commission reasoned: "[W]e agree with NEP that contracting with service providers to perform these tasks does not in and of itself mean NEP is supplying electricity to tenants. Other non-third-party electrical companies who are contracted to perform similar work on infrastructure, whether as a contractor for AEP Ohio or for a landlord converting to master-meter service but not using a third-party submetering company, would not be considered a public utility when performing these services. Although those contractors likely would be paid directly by AEP Ohio or the landlord instead of by collecting revenues resulting from tenants' electric usage like NEP does, in the context of this case, we find that the payment arrangement, including the forward commission and residual payments described in the lease, was willingly agreed to by the landlords and NEP and, as such, our conclusion regarding their relationship remains the same." Opinion & Order ¶ 211.

There is yet another argument against NEP's agency theory that AEP Ohio made repeatedly, and the Commission did not address in its Opinion & Order – namely, that NEP cannot, legally or factually, be the landlord's agent because NEP does not follow the laws governing landlords. As AEP Ohio has pointed out (Initial Br. at 114-116), there are two circumstances in which NEP does not follow Ohio landlord-tenant law, thus proving that NEP is not acting as an "agent" of the landlord. First, NEP has not followed R.C. 5321.16(A), the Ohio landlord-tenant law that requires landlords to pay 5% interest on security deposits. (*See* Initial Br. at 114-115; Tr. VI at 1091-92; AEP Ohio Ex. 6, at 36 (NEP003663).) Second, and perhaps more importantly, NEP frequently disconnects tenants' electricity for nonpayment, even though R.C. 5321.12 generally prohibits landlords from disconnecting electricity or other utilities. (*See* Initial Br. at 115-116; AEP Ohio Ex. 1C, Lesser Direct, at 78; AEP Ohio Ex. 1C, Lesser Direct, Ex. SDL-5C; AEP Ohio Ex. 1C, Lesser Direct, Ex. SDL-6C.) This demonstrates that NEP cannot be an agent of the landlord, factually or legally. At a minimum, even if it were legally valid to automatically confer the special legal status of a principal on an agent (it is not, as described above), NEP should not be entitled to hide behind its claim of "agency" because it is not, truly, functioning as an agent. If it were, it would have paid 5% interest on security deposits, and it would *not* have been legally permitted to disconnect utility service for nonpayment. Once again, AEP Ohio made this argument throughout its briefing. (Initial Br. 114-116; Reply Br. 37-38.) Yet the Commission did not address it.

After incorrectly crediting NEP's "agency" theory, the Opinion & Order effectively reinstated the "SSO Price Test" through the "Reseller Tariff" the Commission ordered AEP Ohio to establish. (Opinion & Order ¶ 221.) As noted above (*supra* Section II.C), the Reseller Tariff and its reinstated "SSO Price Test" is inconsistent with the Commission's determination that

NEP is not "engaged in the business of supplying electricity," since if NEP is not "engaged in the business of supplying electricity" and is not an "electric light company" under R.C. 4905.03(C), then the Commission lacks jurisdiction to regulate what NEP may charge tenants for electricity. Moreover, the reinstated "SSO Price Test" is also a fallacy because it does not accurately gauge whether NEP is "engaged in the business of supplying electricity." NEP pays a reduced "bulk" rate for the kilowatt-hours of energy that AEP Ohio delivers to the master meter, and NEP then resells that energy to the tenants at a markup. Thus, it is entirely possible for NEP to make a profit by buying at the master meter and reselling at the "SSO Price" consistent with the reinstated "SSO Price Test." Accordingly, the SSO Price Test is not a valid means of interpreting "engaged in the business" under R.C. 4905.03(C). An entity may be "engaged in the business of supplying electricity" and making a substantial profit even if it is acting within the bounds of the SSO Price Test – indeed, that is NEP's entire business model.

IV. *Fourth Ground for Rehearing:* The Commission's Stay Order and Final Order Were Unlawful Because the Commission Failed to Consider Whether AEP Ohio's Forced Abandonment of the Apartment Complexes Was "Reasonable" and Promoted the "Welfare of the Public" Under the Miller Act, R.C. 4905.20-.21.

In its Initial Post-Hearing Brief, AEP Ohio explained why it would be unlawful for the Commission to direct AEP Ohio to convert the five Apartment Complexes to master metered service without first determining, under the Miller Act, whether such conversions are "reasonable," as that Act requires. (AEP Ohio Br. at 132-134.) As AEP Ohio noted, the Miller Act provides that no public utility shall "be required to abandon or withdraw any … electric light line … or any portion thereof, … or the service rendered thereby" without holding a hearing to "ascertain the facts" and determine that the proposed abandonment is "reasonable, having due regard for the welfare of the public … ." (*Id.* at 132 (citing R.C. 4905.20, R.C. 4905.21).) AEP Ohio went on to explain that, if the five Apartment Complexes were converted to master meter

service, the residents of the Apartment Complexes would cease to be AEP Ohio customers and the replaced lines and equipment would be abandoned, thus directly implicating the Miller Act and its requirements. (AEP Ohio Br. at 133.) And withdrawing individual service to those customers, AEP Ohio explained, would be unreasonable due to the numerous statutory and regulatory protections afforded under Ohio law to the customers of electric light companies – but not to the tenants of NEP's customers. (*Id.* at 134.)

The Commission's Opinion and Order, although lengthy, devotes only a single brief paragraph to AEP Ohio's contentions regarding the Miller Act. Opinion and Order ¶ 231. That short paragraph provides three bases for the Commission's rejection of those contentions. *Id.* Notably, all three of these bases are procedural or prudential in nature; none of them address the merits of whether the required conversions are, in fact, "reasonable" under the Miller Act. *Id.* First, the Commission implies (but does not directly state) that AEP Ohio waived its Miller Act arguments because "AEP Ohio's three counts within its Complaint do not specifically assert a Miller Act violation under R.C. 4905.20 and 4905.21." *Id*. Next, the Commission concludes that because the conversions of the Apartment Complexes were already completed before the Commission issued its Opinion and Order, "any determination as to proper abandonment is moot." *Id.* Finally, the Commission asserts that "AEP Ohio filed no separate application for abandonment for the Apartment Complexes based upon which we could make a decision." *Id.* For the reasons set forth below, all three of these grounds for rejecting AEP Ohio's Miller Act arguments are unlawful and unreasonable and should be corrected on rehearing.

A. AEP Ohio Did Not Waive Its Miller Act Arguments.

The Commission's single-sentence suggestion that AEP Ohio waived its Miller Act arguments is inconsistent with the text of the Miller Act itself, the text of AEP Ohio's Complaint, the Commission's precedent, and established Ohio case law.

As a threshold matter, the plain text of the Miller Act applies when a utility is "required to abandon" its facilities, R.C. 4905.20, and here that requirement arose from the Attorney Examiner's Stay Entry, the Commission's denial of AEP Ohio's request for an interlocutory appeal therefrom, and the Commission's Opinion and Order. Although R.C. 4905.21 speaks of *applications* for abandonment filed by railroads, political subdivisions, and public utilities, R.C. 4905.20 plainly anticipates other scenarios such as the one at issue here, when a utility is "required to abandon" its lines or service by Commission order or some other requirement, not based upon any application to do so submitted by the utility. *See* R.C. 4905.20; *see also State ex rel. Toledo Edison Co. v. Clyde*, 76 Ohio St.3d 508, 511 (1996) ("[T]he Miller Act . . . requires municipalities to obtain commission approval before *forcing abandonment* of non-municipal utility facilities or the withdrawal of non-municipal utility services.") And even in scenarios triggered by applications that may be filed pursuant to R.C. 4905.21, the Miller Act imposes no specific pleading requirement for those applications, saying only that they must be "in writing." R.C. 4905.21. The complaint statute applicable in the Commission, R.C. 4905.26, parallels this basic "in writing" requirement without imposing additional technical pleading requirements for Miller Act claims. R.C. 4905.26; *see also* OAC 4901-1-03 (form of pleadings).

AEP Ohio *did* clearly invoke the Miller Act in writing, in Paragraph 4 of its Complaint, by stating that AEP "strongly values its relationship with its customers and *should not be forced to abandon them*." (Emphasis added.) AEP Ohio also expressly asked the Commission not to "force" AEP Ohio to "abandon" its customers in Paragraphs 10, 70, 71, and 74 of the Complaint. And in its prayer for relief, AEP Ohio expressly requested a "finding and order that AEP Ohio need not terminate service to the Apartment Complex Customers and that AEP need not reconfigure and establish master meter service to the Apartment Complexes."

Although the Commission is not bound by the Ohio Rules of Civil Procedure, it has indicated that it "may use them for guidance in procedural matters."[8] Under those Rules, Ohio is a notice pleading state in which plaintiffs need only include a "short and plain" statement of their claims in their pleadings,[9] and the above-described allegations in AEP Ohio's Complaint put NEP on notice that any required, permanent conversion of the Apartment Complexes to master meter service would equate to a compelled abandonment of service implicating the Miller Act. It is well established that an Ohio complaint need not cite any specific Ohio statute by its assigned number in the Ohio Revised Code in order to meet Ohio's flexible notice pleading requirements and allow for relief to be granted under that statute. As the Ohio Supreme Court explained nearly three decades ago

Consistent with notice pleading standards, the Commission itself has previously declined to dismiss a Miller Act issue that was merely "inferred" – not expressly set forth – from a party's pleading. *In the Matter of the Complaints of Katherine Lycourt-Donovan, Seneca Builders LLC, and Ryan Roth et al.,* Case Nos. 12-2877-GA-CSS, 13-124-GA-CSS, & 13-667-GA-CSS, Opinion and Order at 3-4 (Jan. 14, 2015). In that case, a number of complainants alleged that Columbia Gas of Ohio, Inc. ("Columbia") unreasonably and unlawfully terminated gas service to all homes in a subdivision. *See generally id.* Although Columbia sought dismissal of Ms. Donovan's Miller Act claim due to her failure to expressly allege it, the Commission declined to do so, saying the claim was "inferred" from her complaint, and that "the applicability of the

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[8] *In the Matter of the Complaint of Edward B. Nenadal v. The Cleveland Electric Illuminating Company Relative to Alleged Unjust Charges Due to a Faulty Meter*, Case No. 84-1293-EL-CSS, Entry, 1986 Ohio PUC LEXIS 727, *5 (July 8, 1986).

[9] *See* Civ.R. 8(A)(1); *see also Patrick v. Wertman*, 113 Ohio App.3d 713, 716, 681 N.E.2d 1385 (3d Dist. 1996). "Because it is so easy for the pleader to satisfy the standard of Civ. R. 8(A), few complaints are subject to dismissal." *Leichtman v. WLW Jacor Communications, Inc*., 92 Ohio App.3d 232, 234, 634 N.E.2d 697 (1st Dist. 1994).

abandonment statute was an issue in these cases and at the hearing and will be reviewed by the Commission during the consideration of the evidence in these matters. *Id.* at 3-4.

Here, too, AEP Ohio's Miller Act claim could at the very least be "inferred" from its Complaint, due to the pleading's multiple references to abandonment of service, and the issue was also raised in pre-filed testimony and at hearing. (*E.g.*, AEP Ohio Ex. 1, Lesser Direct, at 28-32; Tr. Vol. I, at 68-75.) Moreover, under the Ohio Rules of Civil Procedure, issues "not raised by the pleadings" may yet be tried by express or implied consent of the parties. Civ.R. 15(B). Here, NEP's counsel elected to cross-examine Mr. Lesser at hearing regarding his Miller Act-related direct testimony, thereby expressing (or implying) NEP's consent that the issue be tried. *Accord Margala v. Berzo*, 11th Dist. Trumbull No. 2003-T-0155, 2005-Ohio-2265, ¶ 14 ("Factors to be considered in making a determination as to whether the parties impliedly consented to the litigation of a particular issue include: whether the parties recognized that an issue not in the pleadings entered the case; whether the opposing party had the opportunity to adequately address the issue or would offer additional evidence if the case were tried on a different theory; and whether the witnesses were subject to cross-examination on the particular issue.") As such, the Commission's failure to address the merits of AEP Ohio's Miller Act arguments runs counter to settled Ohio pleading practice and the Commission's prior approach in *Lycourt-Donovan*.

B. AEP Ohio's Miller Act Arguments Are Not Moot.

In addition to suggesting, wrongly, that AEP Ohio waived its Miller Act arguments by failing to "specifically assert a Miller Act violation" in its Complaint, the Commission also declines to address the merits of those arguments on mootness grounds. (Opinion and Order at ¶ 231.) For three separate but independently sufficient reasons, the Commission is mistaken and should correct its error on rehearing.

For one, the completion of the required conversions at the Apartment Complexes pursuant to the Commission's prior stay did not render the Miller Act claims moot. If that were the case, after all, then utilities and the Commission could render the Act a dead letter simply by completing unreasonable abandonments – or by requiring them to be completed – before any "reasonableness" determination about the abandonments had yet been made at any hearing. Put differently, the Commission and Ohio utilities could negate the Act's express requirements by ignoring them. Yet the General Assembly expressly cautions against constructions of statutes that would render them inoperative, ineffective, or infeasible of execution. R.C. 1.47(B) & (D). And this Commission has previously recognized that "Ohio law and the rules of statutory construction demand the Commission give effect to each and every word in the statute."[10] In *Lycourt-Donovan*, *supra*, for example, the fact that the gas service disconnection had already been accomplished at the plaintiffs' subdivision did not cause the Commission to dismiss plaintiffs' abandonment claims on mootness grounds. *See also In the Matter of the Complaint of Steve Bowman, et al., v. Columbia Gas of Ohio, Inc. and Columbia Gas Transmission Corporation Relative to the Allegations of Improper Maintenance of Gas Pipelines and Improper Termination of Service*, Case No. 83-1328-GA-CSS, Opinion and Order, (Feb. 17, 1988) (issuing a 1988 decision on the merits of a Miller Act claim even though the disputed pipeline had been taken out of service three years earlier in compliance with a federal agency order).

Second, the Commission's mootness determination is inconsistent with the concept of interim relief provided by stays. The conversions already completed here at the Apartment Complexes were undertaken by AEP Ohio pursuant to the Attorney Examiner's December 28,

[10] *In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143, in the Form of an Electric Security Plan*, Case No. 13-2385-EL-SSO, Seventh Entry on Rehearing, at ¶ 30 (Apr. 5, 2017).

2021 Stay Entry. In that Entry, the Attorney Examiner noted that the stay was granted so that "the status quo be maintained," and "stress[ed]" that the stay was *not* intended to prejudge the merits of this dispute. Stay Entry at ¶ 31. And when the Commission subsequently denied AEP Ohio's interlocutory appeal from the Stay Entry, the Commission did not modify this language in the Stay Entry; nor did the Commission state that AEP Ohio's compliance with the Stay Entry (*i.e.*, conversion of the Apartment Complexes to master meter service) would moot any of AEP Ohio's claims. *See generally* Entry (July 27, 2022). For the Commission to now use AEP Ohio's conversion activities (taken in *compliance* with the Stay Order) as the basis to dismiss AEP Ohio's Miller Act allegations undercuts the plain language and intent of the Stay Entry (purportedly, the preservation of the *status quo*, without any determination on the merits) as well as basic fairness. Ohio courts do not force parties to choose between the Scylla of disregarding a court order and the Charybdis of mootness[11] — indeed, that kind of forced choice is exactly what stays are supposed to prevent – and neither should this Commission.

Third, in deeming AEP Ohio's Miller Act allegations moot, the Commission failed to consider any of the exceptions to the mootness doctrine that have long been recognized and applied both by the Commission and the Ohio Supreme Court. There are at least two such exceptions to the mootness doctrine applicable here:

First, there is the settled mootness exception for issues that are capable of repetition yet evading review, which the Ohio Supreme Court has held requires just two factors to be present: "(1) the challenged action is in its duration too short to be fully litigated prior to its cessation or

[11] *See, e.g., PR Transp., Inc. v. McClure*, 6th Dist. Lucas No. 2010-Ohio-1364, ¶ 11 ("Were this court to find Mr. Strong's withdrawal under the facts of this case amounted to a 'satisfaction of judgment,' we would in effect be creating a rule in disqualification matters whereby counsel would be forced to choose between disregarding the trial court's judgment (and facing contempt, possible disciplinary action, as well as sanctions against the client) and preserving the client's right to appeal the order disqualifying counsel. We decline to do so.")

expiration, and (2) there is a reasonable expectation that the same complaining party will be subjected to the same action again." *M.R. v. Niesen*, 167 Ohio St.3d 404, 2022-Ohio-1130, ¶ 11. Both the Commission and the Supreme Court have applied this mootness exception when those two factors are met. *See In the Matter of the Complaint of Donald Clark v. Ohio Edison Company*, Case No. 19-293-EL-CSS, Opinion and Order at ¶ 36 (Mar. 10, 2021) ("While Complainant's testimony may render his Complaint moot, we nevertheless continue to address the merits of his claims, as the actions he describes – parking cars near the transmission line – are not disputed and are capable of reoccurrence in the future."); *State ex rel. Beacon Journal Pub. Co. v. Donaldson*, 63 Ohio St.3d 173, 175 586 N.E.2d 101 (1992) (remanding courtroom closure case for merits review because even though closure order had terminated, such orders often evade review by expiring before review can be accomplished); *State ex rel. Repository v. Unger*, 28 Ohio St. 3d 418, 419, 504 N.E.2d 37 (1986) (same). Here, both of the required factors are present for the capable-of-repetition mootness exception to apply. The conversions to master meter service at issue here can be completed (or undone) in a duration of time far shorter than this lengthy litigation addressing their legality. And there is a reasonable likelihood that AEP Ohio will be subjected to the same required conversions again; the Commission's Opinion and Order requiring AEP Ohio to file a new electric resale tariff guarantees as much. Accordingly, instead of dismissing AEP Ohio's Miller Act claims on mootness grounds, the Commission should have addressed them on the merits, pursuant to the recognized exception for issues that are capable of repetition yet evading review.

Second, the Ohio Supreme Court has noted another exception to the mootness doctrine, holding that "[a]lthough a case may be moot with respect to one of the litigants, this court may hear the appeal where there remains a debatable constitutional question to resolve, or where the

matter appealed is one of great public or general interest." *State ex rel. White v. Koch*, 96 Ohio St.3d 395, 2002-Ohio-4848, ¶ 16 (citing *Franchise Developers, Inc. v. Cincinnati*, 30 Ohio St.3d 28, 505 N.E.2d 966 (1987), paragraph one of the syllabus; and *Danis Clarkco Landfill Co. v. Clark Cty. Solid Waste Mgt. Dist.*, 73 Ohio St.3d 590, 598, 653 N.E.2d 646 (1995).) That exception to the prudential (not obligatory) mootness doctrine applies here as well. Not only AEP Ohio, but also the many thousands of public consumers of electricity who are now sure to become part of NEP's new, big-business model of submetering, have a right to a merits decision by this Commission as to whether compelling AEP Ohio to abandon service to them passes muster under the Miller Act.

C. AEP Ohio Was Not Required to File a "Separate Application for Abandonment" to Properly Invoke the Miller Act in This Proceeding.

It is no excuse for the Commission to say that AEP Ohio did not file a separate Miller Act case. Opinion and Order ¶ 231. The Act itself nowhere requires a separate case, and it would be unduly wasteful to try the claims present here separately from an abandonment case. The Commission has previously addressed the merits of Miller Act claims asserted in conjunction with other claims, without the party seeking relief under the Miller Act filing any "separate" application of the type the Commission suggests is required in its Opinion and Order. For example, in *Lycourt-Donovan*, Ms. Lycourt-Donovan asserted her abandonment claim (which the Commission declined to dismiss) in conjunction with other claims: claims for inadequate service; that Columbia discriminated against her; and that Columbia violated the Commission's rules pertaining to the investigation of consumer complaints. *Lycourt-Donovan*, *supra*, Opinion and Order, at 8-17.

In addition to conflicting with its own precedents interpretating the same statute, requiring AEP Ohio to file an application in this context contradicts the plain text of R.C.

4905.21, which provides that a public utility "*desiring*" to abandon service "shall make application" to the Commission to do so. R.C. 4905.21 (emphasis added). AEP Ohio does not "desire" to abandon service to the many tenants of the Apartment Complexes, and thus should not be the party compelled to "make application" under a plain reading of R.C. 4905.21. AEP Ohio does not "desire" to see those former customers in its Certified Territory permanently removed from its customer rolls and stripped of the many protections afforded to customers of public utilities. Again, the statute says a party should "make application to the public utilities commission in writing" – that does not connote a separate or stand-alone application that only addresses the Miller Act claim as the Opinion and Order falsely assumes. Rather, the several references and requests in AEP Ohio's Complaint that cite the Miller Act are more than sufficient under R.C. 4905.21's plain language to have made application to the Commission in writing asking for a determination under the Miller Act. The issue was presented in the case in writing as part of the pleading that initiated this case and reinforced in testimony and subsequent pleadings; the Opinion and Order's "form over substance" approach, in tandem with the unlawful Stay Entry, ignores that the controlling statute mandates that Commission approval occur before any such abandonment can go forward. AEP Ohio only converted the Apartment Complexes in compliance with the Attorney Examiner's Stay Entry, which (improperly) required AEP Ohio to do so.

Accordingly, the Commission's determination that AEP Ohio was required to file a "separate" application to invoke the Miller Act is unreasonable, contrary to the express language of R.C. 4905.21, and should be corrected on rehearing.

D. On Rehearing, the Commission Should Conclude that the Required Conversions to Master Meter Service Are Unreasonable Under the Miller Act.

Because the Commission dismissed AEP Ohio's Miller Act arguments on procedural and prudential grounds, the Commission never reached the merits of AEP Ohio's contention that the compelled withdrawal of individual service to the tenants of the Apartment Complexes is not "reasonable, having due regard for the welfare of the public and the cost of operating the … facility" (R.C. 4905.21), because those tenants lose out on the numerous statutory and regulatory protections afforded under Ohio law to the customers of electric light companies. (AEP Ohio Initial Br. at 134.) On rehearing, the Commission should address the merits of AEP Ohio's Miller Act claim, conduct the reasonableness inquiry compelled by that Act, and make sufficient findings required under R.C. 4903.09 to explain how these numerous protections lost by AEP Ohio's former customers at the Apartment Complexes are "reasonable, having due regard for the welfare of the public[:]"

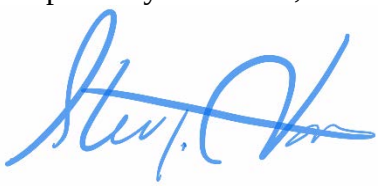
- the lost right to request meter tests to ensure compliance with ANSI accuracy standards;
- the lost assurance of reasonable rates and rate changes reviewed by the Commission;
- the lost right to shop for electricity supply;
- the lost protections afforded by the Commission's service disconnection rules;
- the lost access to PIPP and other extended payment plans that the Commission requires public utilities to offer their customers;
- the lost protections offered by the Commission's Special Reconnect Order for the winter heating season;
- the lost ability to bring informal and formal complaints in the Commission under R.C. 4905.26; and
- the public's loss of the portion of the Apartment Complexes' tenants' rates that would have been paid to Ohio's Universal Service Fund.

The Commission's failure to address these concerns on the merits in the context of a Miller Act inquiry negates the Act's central police-power purpose, which is to protect against unlawful abandonments of public utility service, whether such abandonments are "required" (per R.C. 4905.20) or "desire[d]" (per R.C. 4905.21).

CONCLUSION

For the foregoing reasons, the Commission should grant rehearing and reverse or modify the findings of fact and conclusions of law set forth in the Opinion and Order.

Respectfully submitted,



Steven T. Nourse (0046705), Counsel of Record
Michael J. Schuler (0082390)
American Electric Power Service Corporation
1 Riverside Plaza, 29th Floor
Columbus, Ohio 43215
Telephone: (614) 716-1608 (Nourse)
Telephone: (614) 716-2928 (Schuler)
Email: stnourse@aep.com
Email: mjschuler@aep.com

Matthew S. McKenzie (0091875)
M.S. McKenzie Ltd.
P.O. Box 12075
Columbus, Ohio 43212
Telephone: (614) 592-6425
Email: matthew@msmckenzieltd.com

Counsel for Ohio Power Company

CERTIFICATE OF SERVICE

In accordance with Rule 4901-1-05, Ohio Administrative Code, the PUCO's e-filing system will electronically serve notice of the filing of this document upon the following parties. parties. In addition, I hereby certify that a service copy of the foregoing was sent by, or on behalf of, the undersigned counsel to the following parties of record this 6th day of October 2023, via email.

Steven T. Nourse

Email service list:

Michael J. Settineri
Anna Sanyal
Andrew Guran
Thomas J. Whaling
Vorys, Sater, Seymour and Pease LLP
mjsettineri@vorys.com
aasanyal@vorys.com
apguran@vorys.com
tjwhaling@vorys.com
Drew B. Romig
Nationwide Energy Partners, LLC
dromig@nationwideenergypartners.com

Summary: Application APPLICATION FOR REHEARING OF OHIO POWER COMPANY electronically filed by Mr. Steven T. Nourse on behalf of Ohio Power Company.